ḤAWĀDITH ṬĀRI'A

IN ISLAMIC COMMERCIAL LAW

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IN THE NAME OF ALLĀH
THE COMPASSIONATE, THE MERCIFUL

AND

THE BLESSING AND PEACE BE UPON HIS PROPHET
MUḤAMMAD

I, THE UNDERSIGNED, HEREBY MAKE A SOLEMN DECLARATION THAT THIS THESIS HAS BEEN COMPOSED AND WRITTEN BY MYSELF AND THAT THE WORK DESCRIBED IS ENTIRELY MY OWN UNLESS EXPLICITLY STATED IN THE TEXT.

MD KHALIL RUSLAN

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"One who is not grateful to human beings,
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ABSTRACT

In the face of the desire to re-establish the *sharīᶜa* in commercial activity, study of new perspectives in *fiqh* is a crucial part of modern Islamic legal thought. This study deals with *ḥawādith ṭāri'a*, one of the new legal terms in *fiqh* which is concerned with the status of a contract in commercial transactions. Despite the fact that *ḥawādith ṭāri'a* is usually considered in Western sources as coming under the law of contract, this study is confined to the Islamic legal category of commercial transactions. Therefore, this study begins by considering the law of contract and its connection with the Book of Sales.

As a theory in contemporary Islamic legal circles, *ḥawādith ṭāri'a* addresses exceptional circumstances in commercial contracts which render the performance of the contractual obligation onerous. This study is concerned with understanding the sources of the theory, particularly the *ḥadīths* of the Prophet (peace be upon him) dealing with *waḍᶜ al-jawā'iḥ*, where the foundation of the theory can be seen to have its origins. The significance of *waḍᶜ al-jawā'iḥ*, a classical doctrine regarding calamities that occur to crops after the completion of a sales contract, is examined at length, together with the classical legal texts on the sale of fruit before its ripeness is evident (*bayᶜ al-thimār qabla an yabduwa ṣalāḥuhā*). Also, the doctrine of *ᶜudhr*, which concerns being excused in the performance of contractual liability in hiring and leasing, is studied. From all of the above, the classical underpinnings of the concepts of *ḥawādith ṭāri'a* become abundantly evident.

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NOTE ON TRANSLITERATION

In this work, a modified version of the transliteration system of the *Encyclopaedia of Islam* has been used, according to the following principles:

A. Consonants

ا	’	ط	ṭ
ب	b	ظ	ẓ
ت	t	ع	ᶜ
ث	th	غ	gh
ج	j	ف	f
ح	ḥ	ق	q
خ	kh	ك	k
د	d	ل	l
ذ	dh	م	m
ر	r	ن	n
ز	z	ه	h
س	s	و	w
ش	sh	ي	y
ص	ṣ		
ض	ḍ		

B. Short vowels

fatḥa	=	a
kasra	=	i
ḍamma	=	u

C. Long vowels

fatḥa	+	alīf	=	ā
kasra	+	yā	=	ī
ḍamma	+	waw	=	ū

D. Diphthongs

fatḥa	+	yā	=	ay
fatḥa	+	waw	=	aw

E. Other combinations of sound

wa - al	=	wa -l
fī - al	=	fī -l
dhū - al	=	dhu -l

F. The *tā' marbūṭa* is represented by *at* when in construct and omitted at the end of a word.

JOURNALS

ACCL	*Arab Comparative and Commercial Law*
AJCL	*American Journal of Comparative Law*
ALQ	*Arab Law Quarterly*
CJTL	*Columbia Journal of Transnational Law*
ICLQ	*International and Comparative Law Quarterly*
LMCLQ	*Lloyd's Maritime and Commercial Law Quarterly*
YIMEL	*Yearbook of Islamic and Middle Eastern Law*

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PART ONE

GENERAL BACKGROUND

INTRODUCTION

> "God commands justice, the doing of good, and liberality to kith and kin, and He forbids all shameful deeds, and injustice and rebellion: He instructs you that you may receive admonition."
>
> - *al-Naḥl* (16): 90

The idea of the reconstruction of legal thought in Islam is primarily motivated by a global awareness amongst the new generation of Muslims of the importance of practising Islam as a way of life. It seems obvious that the reassertion of the Islamic legal system in most Muslim countries, initiated by modern Muslim scholars, is a reaction to the view of their Western counterparts that there is a *lacuna* in the *sharīᶜa*, particularly in the world of modern commercial contracts. In doing so, these Muslim scholars have turned to the best minds of the past for inspiration and guidance. As the process goes on, especially in the area of commercial law, they are not only accelerating a resurgence of the Islamic legal system but also, beyond their expectation, bridging the system with the Western legal system.[1] The Iraqi code, according to al-Sanhūrī, the architect of the new Egyptian Civil

[1] W.M. Ballantyne, The Sharia And its Relevance to Modern Transnational Transactions, "*Arab Comparative & Commercial Law - The International Approach*," vol. 1, Graham & Trotman, London, 1987, pp. 4-23.

Code of 1949 and other Arab nations, is "the first modern code to join together Islamic jurisprudence and modern Western law on an equal basis".[2]

When al-Zuḥaylī, in his book A*l-Fiqh al-Islāmī wa Adillatuhu*, uses the phrase 'what civil law has gained from Islamic law' (*mā iqtabasahu al-qānūn al-madanī min al-fiqh al-Islāmī*),[3] he suggests that the Egyptian Civil Code of 1949 and most of the civil codes of the Arab nations which were heavily influenced by the European codified systems and the French Code in particular, have adopted several doctrines from the *sharīʿa* which were absent in the previous civil codes. One of the doctrines is that of 'unexpected circumstances' (*ḥawādith ṭāri'a*), which deals with unforeseen and exceptional events that occur after the conclusion of a contract.

Ḥawādith ṭāri'a is a new term in *fiqh*. There are several other terms which bear a similar connotation such as *al-ẓurūf al-ṭāri'a*, *al-aḥwāl al-ṭāri'a*, *ḥawādith istithnā'iyya* and *ḥadīth fujā'ī*. As a modern legal theory, *ḥawādith ṭāri'a* still has not been treated broadly and presented systematically by Muslim jurists. Extensive discussion on this matter only began after the

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[2] E. Hill, *al-Sanhūrī and Islamic Law*, The American University in Cairo Press, Cairo, Egypt, 1987, p. 120.

[3] See al-Zuḥaylī, *al-Fiqh al-Islāmī wa Adillatuhu*, vol. 4, *Dār al-Fikr*, Damascus, 1996/1417, pp. 290-340.

inclusion of a provision on *ḥawādith ṭāri'a* in the new Egyptian Civil Code of 1949 under Article 147 of that code which reads:

> "The contract makes the law of the parties. It can be revoked or altered only by mutual consent of the parties or for reasons provided for by the law.
>
> When, however, as a result of exceptional and unpredictable events of a general character, the performance of the contractual obligation, without becoming impossible, becomes excessively onerous in such a way as to threaten the debtor with exorbitant loss, the judge may, according to the circumstances, and after taking into consideration the interests of both parties, reduce to reasonable limits, the obligation that has become excessive. Any agreement to the contrary is void."

Since then, writing by Muslim jurists has focused on the sources of the theory and its relevancy to that of the doctrine of frustration in common law and the French doctrine of *force majeure*[4] and *cas fortuits*.[5] It is also

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[4] *Force majeure* is a French phrase which has been defined as irresistible compulsion or coercion. In the law of contract, it means an unforeseeable course of events excusing a person from the fulfilment of a contract. Cf. The Concise Oxford Dictionary, (1996) Ninth Edition, BCA, Oxford University Press, p. 529; The comparable Latin phrase is *vis major* which signifies any kind of force, violence, or disturbance relating to a man or his property, and such a degree of superior force that no effective resistance can be made to it. Such a clause is common in construction contracts to protect the parties in the event that part of the contract cannot be performed due to causes which are outside the control of the parties and could not be avoided by exercise of due care. See, West, *Law and Commercial Dictionary*, West Publishing Company, St. Paul, Minnesota, 1985, p. 651.

[5] *Cas fortuit* is a French phrase which means a fortuitous event or an inevitable accident. It is an accident which cannot be prevented by human skill or foresight, but results from natural causes, such as lightning or storms, perils of the sea, inundations or earthquakes, or sudden death or illness. By irresistible force ismeant an interposition of human agency,

thought that one of its sources lies in the *théorie de l'imprévison*[6], a theory recognised by the French administrative courts, but traditionally rejected by French civil law. Early discussion has also focused on whether the theory of *ḥawādith ṭāri'a* is considered as an exception to the general rule expressed in Article 147 of the Egyptian Civil Code that "a contract is the law of the parties" or whether it stands as a general rule by itself. Some Muslim jurists have suggested that the theory was founded as a general rule on the doctrine of necessity (*ḍarūra*), as stated in the Explanatory Memorandum of the 1949 Egyptian Civil Code, while others say that it was founded on moral principles and justice (*ᶜadl*).

The primary aim of this research is to bring to light the theory of *ḥawādith ṭāri'a* as a modern Islamic legal theory by exploring the buried treasures of the classical Islamic legal texts where the substance of the theory has its origin. For that purpose, this thesis is divided into two parts. Part one deals with the general background of the theory in modern legislation and, part two focuses on the relevant provisions in the Qur'ān, the *sunna*, and

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from its nature and power absolutely uncontrollable. See, West, *Law and Commercial Dictionary*, p. 804.

[6] The literal meaning of *imprévision* is 'lack of foresight.' The *théorie de l'imprévision* is basically used by the French Administrative Court to lessen the contractual obligations of the contracting parties because certain circumstances were not foreseen in the formation of the contract.

particularly the classical heritage of *fiqh* where the general concepts of the theory take their shape.

As a term in modern *fiqh*, there is no explicit provision (*naṣṣ*) in the Qur'ān or the *ḥadīth* for *ḥawādith ṭāri'a*. However, the most relevant source of the theory is found in the Book of Sales (*bāb al-bayᶜ*) under the heading of 'a misfortune from Heaven' (*āfa samāwiyya*).[7] The application of this doctrine is specifically discussed in the Book of Calamities (*bāb al-jawā'iḥ*) and the Book of Excuse (*bāb al-ᶜudhr*). Therefore, both *bāb al-jawā'iḥ* and *bāb al-ᶜudhr* are discussed in some detail. Another area which is related to *bāb al-jawā'iḥ* is the sale of fruit before its ripeness is evident (*bayᶜ al-thimār qabla an yabduwa ṣalāḥuhā*) and this is also examined at length. For the purpose of providing a substantial background to the Book of Sales, a brief look into the law of contract has also seemed necessary.

Jā'iḥa [pl. *jawā'iḥ*] is a natural calamity which affects the sale of fruit and crops. The category of *jawā'iḥ* is recognised in the Mālikī and Ḥanbalī schools, and also the Shāfiᶜī school according to al-Shāfiᶜī's early view. Even though the Ḥanafīs do not overtly acknowledge *jā'iḥa*, in principle

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[7] Another notion known in the classical manual of *fiqh* similar to *āfa samawiyya* is *'amr min Allāh* (Act of God). It denotes an event beyond human control such as flood, fire, lightning, drought and the like. See, for example, Ṣubḥī Maḥmaṣṣānī, *al-Naẓariyya al-ᶜĀmma li-l-mūjibāt wa -l-ᶜUqūd*, Beirut, 1983, vol. 2, p. 497.

they do not reject the idea. Instead, the idea of *jā'iḥa* is discussed by the Ḥanafīs under the heading *ᶜudhr*, where it mainly relates to questions of leasing (*ijāra*) and contracts of services.

The consideration of *al-jawā'iḥ* has a strong foundation in the *ḥadīths* of the Prophet. For this research, apart from the 'Six Books' of al-Bukhārī, Muslim, Abū Dāwūd, al-Tirmidhī, al-Nasā'ī and Ibn Mājah, I have also referred to the *Muwaṭṭā'* of Mālik and the *Musnad* of Aḥmad ibn Ḥanbal. All these sources give a good general picture of the subject-matter. Works by prominent Muslim jurists, especially from the Mālikī and Ḥanbalī schools such as *al-Mudawwana al-Kubrā* by Saḥnūn, *Bidāyat al-Mujtahid* by Ibn Rushd, *Majmūᶜ Fatāwā Ibn Taimiyya*, *al-Mughnī* of Ibn Qudāma and *Iᶜlām al-Muwaqqiᶜīn ᶜan Rabb al-ᶜĀlamīn* by Ibn Qayyim al-Jawziyya have made the task of elaborating the subject-matter easier to accomplish. Ibn Taimiyya's *Fatāwā* needs special mention. Standing midway between modern *fiqh* and the age of revelation,[8] Ibn Taimiyya's references to the topic show that the doctrine of *jā'iḥa* flourished during his time. This explains why *waḍᶜ al-jawā'iḥ* has been discussed in depth and presented systematically by him. There are also a number of other important works which have been consulted for this research, such as, for the Malikīs, *Bulghat al-Sālik*

[8] Ibn Taimiyya's life-time (1263-1328).

li-Aqrab al-Masālik by al-Dirdīr, *al-Muntaqā* by al-Bājī, *al-Bayān wa-l-Taḥṣīl* by Ibn Rushd, *al-Kāfī fī Fiqh ahl al-Madīna* by Ibn ᶜAbd al-Barr, and for the Shāfiᶜīs, *al-Umm* by al-Shāfiᶜī himself, *Kitāb Majmūᶜ* by al-Nawawī and *al-Tahzīb fī Fiqh al-Imām al-Shāfiᶜī* by al-Baghawī . All these essential references have also been used to understand the discussions on *bayᶜ al-thimār qabla an yabduwa ṣalāḥuhā* as well, which can be regarded as part of the discussion on *waḍᶜ al-jawā'iḥ*.

Any discussion of *ᶜudhr* inevitably involves consideration of the works of the Ḥanafīs on *ijāra*, and for this I have used the great works of Ḥanafī jurists such as *Kitāb al-Mabsūṭ* by al-Sarakhsī, *Badā'iᶜ al-Ṣanā'iᶜ fī Tartīb al-Sharā'iᶜ* by al-Kāsānī and *Tabyīn al-Ḥaqā'iq* by al-Zaylaᶜī. However, books by jurists from other schools have also been consulted to further attest the adaptability of the doctrine in the *sharīᶜa*. Where necessary, reference has also been made to *Majallat al-Aḥkām al-ᶜAdliyya*, as it is based on the classical legal texts of the Ḥanafīs and is generally a clear and useful source.

As far as the application of the theory in modern legislation is concerned, I have relied heavily on two works of ᶜAbd al-Razzāq Aḥmad al-Sanhūrī, *Maṣādir al-Ḥaqq fī -l-Fiqh al-Islāmī* and *al-Wasīṭ* for the reasons mentioned above. Apart from that, there are many other secondary sources which have

been consulted throughout this research, especially the highly regarded *al-Fiqh al-Islāmī wa Adillatuhu* by Wahbah al-Zuḥaylī, *al-Naẓariyya al-ᶜĀmma li-l-Mūjibāt wa -l-ᶜUqūd fī -l-Sharīᶜa al-Islāmiyya* by ᶜAbd al-Rajab Ṣubḥī Maḥmaṣṣānī and *Kitāb al-Fiqh ᶜalā -l-Madhāhib al-Arbaᶜa* by al-Jazīrī. As far as modern civil codes are concerned, reference has been made in particular to Article 147 of the Egyptian Civil Code of 1949 and Article 146 of the Iraqi Civil Code of 1951. This research has also taken into account various journals articles written by Muslim jurists and their Western counterparts which have contributed a new dimension to the theory in particular by making a significant comparative study between Islamic law and that of the West on this topic.[9]

Lastly, I must point out that I consider this thesis to be only an introduction to the theory of *ḥawādith ṭāri'a*. In my opinion, further research is needed on this particular subject, especially with regard to its application in the codified legal systems now operating in most Arab countries. A case study of actual instances of the application of new provision for *ḥawādith ṭāri'a* would be sure to lead to interesting results.

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[9] During my research, I also came across two unpublished theses on this topic, namely, *Naẓariyyat al-Ẓurūf al-Ṭāri'a* by Yaḥyā Khayreddīn (Cairo, 1955) and *Naẓariyyat al-Ẓurūf al-Ṭāri'a* by al-Tramāninī (Damascus, 1971). However, unfortunately, I have not been able to gain access to either of them.

CHAPTER I

CONTRACT AND SALES IN COMMERCIAL TRANSACTIONS

1.0 Introduction

This chapter focuses on two fundamental subjects. First, it deals with the law of contract in Islam and, second, it deals with the book of sales (*bāb al-buyūᶜ*). A brief look into the law of contract is necessary as it is in this context that *ḥawādith ṭāri'a* and other related matters must be discussed. The book of sales has been chosen for discussion for two reasons: first, the book of sales is the most important of the nominate contracts (*ᶜuqūd muᶜayyana*) which form the prototype contract from which all other classes of contract are analogously developed;[1] and secondly, the concept of *ḥawādith ṭāri'a* is closely related to the contract of sales.

[1] S.E. Rayner, *The Theory of Contracts in Islamic Law*, London/Dordrech/Boston, 1991, p. 86.

1.1 Islamic law of contract

The early Muslim jurists devoted their works to every type of nominate contracts known at their times comprehensively. The fact that they were almost exclusively concerned with nominate or specific contracts with their own distinctive rules, especially on sales, has led to the suggestion that there is no general theory of contract in Islam.[2] Professor William M. Ballantyne in his "Sharī^{c}a Speech" in Cairo said:

> "One of the great difficulties of the *Sharī^{c}a* is that in the field of contract, adapted to the circumstances at the time, it did not deal with general principles, but rather with specific cases, case by case, and with a series of nominate contracts. This obviously makes it very difficult to extract principles appropriate in the modern context."[3]

This claim, however, is not true and cannot be supported either in theory or in practice according to contemporary Muslim jurists. The lack of a systematic and codified law of contract does not mean that there is no general

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[2] In general, modern Muslim jurists are in agreement that there is no general theory of contract in Islam. See al-Sanhūrī, *Maṣādir al-Ḥaqq fī -l-Fiqh al-Islāmī*, Cairo, n.d., vol. I, p. 40; Maḥmaṣṣānī, *al-Naẓariyya al-^{c}Āmma*, p. 277; al-Zuḥaylī, *al-Fiqh al-Islāmī wa Adillatuhu*, Damascus, 1996, vol. 4, p. 78.

[3] W.M. Ballantyne, "The Sharī^{c}a And Its Relevance To Modern Transnational Transactions". *Arab Comparative & Commercial Law*, I (1987), pp. 4-23. His view is also shared by Professor Noel J. Coulson and Professor Sir Norman Anderson who suggest that the *lacunae* in the sharī^{c}a in the world of modern commercial contracts might be dealt with by treating such contracts as *sui generis*.

theory of contract in Islam. Even though al-Sanhūrī and al-Zuḥaylī seem to agree with this suggestion, their further comments on this matter could be interpreted otherwise. According to al-Zuḥaylī, the early Muslim jurists founded the rules and structures for each and every type of contract, and it is the duty of their modern counterparts to derive the rules therefrom in order to establish a general theory of contract.[4] Al-Sanhūrī, in his wider perspective on the works of the early Muslim jurists says:

> "...they have discussed all types of contracts, their pillars (*arkān*) and rules (*aḥkām*). They have discussed contracts of sales (*bayᶜ*), gifts (*hiba*), contract for service or hire (*ijāra*), agricultural contracts (*muzāraᶜa*), lease of agricultural land (*musāqāt*), partnership (*sharika*), contracts of hire (*ᶜāriya*), loan of fungible commodities (*qarḍ*), deposits (*wadīᶜa*), suretyship (*kafāla*), transfer of obligation (*ḥiwāla*), pledge (*rahn*) and reconciliation (*ṣulḥ*) in detail. From all the rules they have founded, a uniform rule is derived and established as a general theory of contract. This is what the contemporary Muslim jurists have done in their writings."[5]

The existence of certain general rules of the law of contract, over and above the specific rules of the nominate contracts, is evident from the primary sources of Islamic law. In his book, Sayed Hassan Amin comes up

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[4] al-Zuḥaylī, *al-Fiqh al-Islāmī*, vol. 4, p. 78.

[5] al-Sanhūrī, *Maṣādir al-Ḥaqq*, vol. I, p. 40.

with the following argument to suggest the existence of a general theory of contract in Islamic law:

1. The Qur'anic verse "*awfū bi -l-ᶜuqūd*"[6] (fulfil your obligations) states that this Qur'anic principle covers all agreements which may be reached between parties, however diverse and different they may be, because there is no limitation to the application of this maxim except what the Qur'an itself has provided to be void or unenforceable for other reasons.

2. This Qur'anic text ordering the fulfilment of contractual obligations applies not only to those contracts which were prevalent at the time of the revelation of the Qur'ān but also to any unprecedented type of contract which may be devised in later days.

3. The principle of admissibility (*al-aṣl al-ibāḥa*) points to the validity of any freely formulated private agreement whether or not it is a nominate contract.[7]

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[6] Q., *al-Mā'ida* (5): 1.

[7] S.H. Amīn, *Islamic Law in The Contemporary World*, Glasgow, 1985, pp. 42-43.

1.2 Islamic law of contract: general overview

The primary source of the law of contract in Islam is the Qur'ānic injunction "*awfū bi -l-ᶜuqūd*" (fulfil your obligations). This verse forms the very broadest principle of contract which includes any types of contracts whether private, public, civil or commercial.[8] It is a comprehensive and universal principle which is applicable to whatever contractual arrangements may come to one's mind. Thus, it is suggested that Islamic law is capable of regulating all types of contract whether or not they fall within the established patterns of the nominate contracts.[9]

Even though Islamic law is capable of regulating all types of contract, this does not mean that all types of contract are permissible. Since Islam is very much concerned with the relations between people and emphasizes establishing justice among people, no one may make a contract or stipulate a condition which is contrary to the general principles of Islam. By way of example, agreements providing for usury and interest in whatever form are prohibited. Contracts involving sinful materials and prohibited acts are void. Another type of prohibited contract is what has been related from the Prophet when he said:

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[8] Rayner, *op. cit.*, p. 87.

[9] S.H. Amin, *Islamic Law & Its Implication*, Glasgow, 1987, pp. 82-83.

"Every agreement is lawful among the Muslims except one which declares forbidden what is allowed or declares allowed what is forbidden, and Muslims are bound by all the conditions they make except those which forbid what is allowed or allow what is forbidden."[10]

1.3 Definition of contract

The Arabic word for contract is *ᶜaqd*. This literally means a knot or bond (*ribṭ*) or confirmation (*iḥkām* or *ibrām*) of something, whether in a physical (*ḥissī*) or mental (*maᶜnawī*) sense, whether from one side or two.[11]

Technically, *ᶜaqd* has two meanings, one general and one specific. The general meaning of *ᶜaqd* is a wish by someone to do an act. It is used by the jurists to denote dispositions of property which are concluded by the offer of one party, such as an endowment (*al-waqf*), or any act by one party, such as an oath (*al-yamīn*) or a declaration of divorce (*al-ṭalāq*), or an act of two parties involving an offer and an acceptance, such as an act of sale, leasing, mortgaging and the like.[12]

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[10] Ibn Mājah, *Sunan ibn Mājah*, Egypt, 1955/1373, vol. 2, p. 788.

[11] al-Zuḥaylī, *al-Fiqh al-Islāmī*, vol. 6, p.80.

[12] al-Zuḥaylī, *ibid.*, p. 80; Rayner. *op. cit.*, p. 88.

The specific meaning of *ᶜaqd* is the combination of an offer and an acceptance which is permitted by the *sharīᶜa* with reference to a particular matter. The offer and the acceptance are interrelated in a legal manner which is seen as mutual consent between two parties involved. [13]

According to Ibn Manẓūr, *ᶜaqd* also means *ᶜahd* (pledge or covenant or contract). He states that the meaning of the word *ᶜuqūd* in the verse *awfū bi-l-ᶜuqūd* is *ᶜuhūd*, which are obligations that must be fulfilled.[14]

The word *ᶜaqd* or contract is defined in the *Majalla* as "the obligation and engagement of two contracting parties with reference to a particular matter."[15] From the above definitions, it is clear that obligations originating from the contract must be in accordance with the *sharīᶜa*. Any contract contrary to the *sharīᶜa* is considered null and void, such as an agreement to hire someone for murder, to steal or to contract a marriage to someone prohibited through marriage impediments.

It is also worthy of note that according to Islamic law, a contract is considered to be concluded by the agreement and consent of both parties, not

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[13] al-Zuḥaylī, *ibid.*, pp. 80-81.

[14] Ibn Manẓūr, *Lisān al-ᶜArab*, Beirut, 1956/1375, vol. 3, p. 297.

[15] *Majallat al-Aḥkām al-ᶜAdliyya*, Art. 103.

in any specific form, nor using any technical verbal or written expressions. Offer and acceptance are in themselves sufficient for the formation of a contract without the requirement of the embodiment of either offer or acceptance in any specific form.[16] In the contract of sales, for example, a sale is completed by an offer and an acceptance.[17] Article 3 of the *Majalla* makes this clear when it states: "In a contract, effect is given to intention and meaning and not to words and phrases." [18]

1.4 Contract, disposition and obligation

Modern jurists are more inclined to define the term *ᶜaqd* in its specific meaning. The application of the term has been made only to bilateral contracts as they appear in Western laws. This approach is reflected in most modern civil codes of the Arab states which define *ᶜaqd* as the law of the parties.[19] An *ᶜaqd* cannot be cancelled or amended except by the agreement of the parties to it. In this respect, other types of agreements or engagements are defined by other terms such as disposition (*taṣarruf*) or obligation (*iltizām*).

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[16] S.H. Amīn, *Commercial Law of Iran*, Glasgow, 1987, p. 51.

[17] *Majallat al-Aḥkām*, Art. 167.

[18] *Majallat al-Aḥkām*, Art. 3.

1.5 Contract and obligation

Obligation is defined as an act which constitutes a right which can be removed, modified and terminated. The act is concluded either by one party, such as in endowments, *ibrā'* (release), and declaration of divorce, or it can be an act of two parties, such as an act of sale or leasing. Therefore, it can be said that obligation is the general meaning of contract as it includes acts by one party, such as endowments, vows (*nadhr*), oaths and the like, and also acts by two parties, such as sales and leasing.[20]

1.6 Contract and disposition

Disposition is defined as an individual's act of free will either in the form of words or deeds. The act may or may not have legal (*shar^{c}*) impact on that person. An act in the form of words includes sales (*ṣīghat al-bay^{c}*), gifts, endowments and admission (*iqrār*), and an act in the form of deeds includes doing what is permissible and the like. Words and deeds may have legal impact on that person, as in the case of sales and hunting (*iṣṭiyād*), or may not, as in the case of endowments and wills.[21] The above definition

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[19] Rayner, *op. cit.*, p. 88.

[20] al-Zuḥaylī, *al-Fiqh al-Islāmī*, vol. 6, pp. 82-83.

[21] See, for example, al-Zuḥaylī, *al-Fiqh al-Islāmī*, vol. 6, p. 83.

indicates that disposition is more general than contract and obligation because it includes acts in the form of both words and deeds. In certain cases, however, disposition in the form of words does not constitute a contract, such as an admission.

In conclusion, we can say that obligation is similar to the general meaning of contract but is more general than the specific meaning of contract. The specific meaning of contract is one type of obligation and it is more specific than disposition. We can also say that every contract is a disposition but not every disposition is a contract.[22]

1.7 Constituent elements of contracts

Contracts have three constituent elements: the contracting party (*al-ᶜāqid*), the object of the contract (*al-maᶜqūd ᶜalayh*) and the form of the contract (*ṣigha*). In sales, the contracting parties are the buyer and the seller. The object of the contract is the property and the value of that property. There are several conditions concerning the object which must be fulfilled in order to effect a valid contract. The form of the contract is an offer and an

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[22] See, for example, al-Zuḥaylī, *al-Fiqh al-Islāmī*, vol. 6, p.84; Rayner, *op. cit.*, p. 89.

acceptance. The conditions concerning the above constituent elements will be discussed later on.

1.7.1 The contracting party

The formation of the contract is only valid if it comes from a person with legal capacity (*ahliyya*) according to the *sharīʿa*. Generally, the parties entering contractual obligations must be able to understand the nature of their acts. In other words, they must be competent persons in order to enter the contract, as the *Majalla* says:

> "In the making of sale, there is a condition that the pillar of the contract should emanate from intelligent persons, that is to say, from reasonable persons, who possess judgement, and that they should attach to a subject of sale, which admits of the consequences of a sale."[23]

A person who is incompetent to exercise legal rights is called an interdicted person (*maḥjūr*). The *Majalla* says:

> "*Ḥajr* is to restrain a particular person from disposing of property at his will. That person after the restraint is called '*maḥjūr*'."[24]

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[23] *Majallat al-Aḥkām*, Art. 361.

[24] *Majallat al-Aḥkām*, Art. 941.

Instances of interdiction include minority, lunacy, imbecility, prodigality, debt and mortal sickness. We shall look briefly at each of these in turn:

a) Minority

Every person entering into a contract must have reached the age of puberty. Those who have not yet reached puberty are minors. A minor is also defined as a young person of imperfect understanding who is unable to discriminate right from wrong and is incapable of entering into a contract of any sort. Such a minor is technically called "*ṣaghīr ghayr mumayyiz*," as indicated in the *Majalla*:

> "'*Ṣaghīr ghayr mumayyiz'* is a young person not understanding selling and buying, that is to say, not knowing that by a sale rights of ownership are lost, and that by purchase they are acquired, and not being able to distinguish between a small deceit, and a deceit which is clearly an excessive deceit, like being deceived five in ten."[25]

However, there is a distinction between a minor who is unable to understand and a minor of perfect understanding who is able to discriminate. Those who are able to discriminate are called '*ṣaghīr mumayyiz.*' Such a person becomes a party to a contract if it is purely for his own benefit, such as the acceptance of a gift without his guardian's consent. But he is not capable

[25] *Majallat al-Aḥkām*, Art. 943.

of entering into a contract which is to his disadvantage, such as bestowing a gift upon someone else.[26]

A minor reaches puberty either when the signs of puberty are apparent or when he reaches the age of puberty. If the signs of puberty are not evident, the person is legally considered to have reached puberty when he reaches the age of puberty. The jurists differ as to what this age is but most of them agree that it occurs at around the fifteenth year. However, if it is shown that a young person who arrives at the age of puberty is not of a mature mind, the court may protect his interests and not allow him to give away his property.[27]

b) Lunacy and imbecility

The quality of a sound mind is a condition for giving consent to a contract. A *maᶜtūh* (lunatic) is considered lacking in discernment and therefore any contract entered into by him is null and void as he is incapable of giving his consent or really understanding the fact of the transaction. A

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[26] P.N. Kourides, "Theory of Contracts In Islamic Law", *Columbia Journal of Transnational Law*, Vol. 9:2 (1970), pp. 394-435.

[27] *Majallat al-Aḥkām*, Arts. 985-987; See also Arts. 983-984, 988-989; Mahmaṣṣānī, *al-Naẓariyya al-ᶜĀmma*, vol. 2, p. 358.

lunatic is defined as a person so deranged in mind that his understanding is limited, his speech confused, and his plan of action bad.[28]

c) Prodigality

A prodigal person or *safīh* is a person who wastes and destroys his property recklessly, by throwing it away, and by scattering and squandering it in his expenses.[29] A person of this kind is considered lacking the quality of a sound mind or prudence (*rushd*) and incapable of managing his own property.[30] Such people are illustrated in the Qur'ān in several verses, as follows:

> "To those weak of understanding (*al-sufahā'* singular *al-safīh*)[31] make not over your property, which God has made a means of support for you, but feed and clothe them therewith, and speak to them words of kindness and justice."[32]

The property of a prodigal person is managed by his guardian and will be given to him in accordance with the law, whenever he needs it, for the

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[28] *Majallat al-Aḥkām*, Art. 945; Mahmaṣṣānī, *al-Naẓariyya al-ᶜĀmma*, vol. 2, p. 370.

[29] *Majallat al-Aḥkām*, Art. 946; Mahmaṣṣānī, *al-Naẓariyya al-ᶜĀmma*, vol. 2, p. 377.

[30] Mahmaṣṣānī, *al-Naẓariyya al-ᶜĀmma*, vol. 2, p. 378.

[31] A.Yūsuf Ali in *The Holy Qurān - Translation and Commentary* says that *al-sufahā'* also applies to orphans.

[32] Q., *al-Nisā'* (4): 5.

purpose of his maintenance.[33] According to the majority of the jurists, the interdiction on them is lifted if they reach sound mind as stated in the Qur'ān:

> "...if then you find sound judgement in them, release their property to them...."[34]

Other people who fall into this category are stupid and simple-minded people who would be easily deceived in business transactions due to their incapability to understand the nature of the business. In this regard, it is the duty of the court to assess the behaviour of a prodigal person and to impose the interdiction upon him at its discretion.[35]

Elderly people can also fall into this category.[36] According to the majority of the jurists, an elderly person (*al-shaykh al-kabīr*) who lacks the quality of sound mind is considered as a minor and prodigal person. Therefore, to protect his interest, he is prohibited from managing his own property.[37]

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[33] al-Qurṭubī, *al-Jāmiᶜ li Aḥkām al-Qur'ān*, Cairo, 1353H/1935M, vol. 5, p. 29.

[34] Q., *al-Nisā'* (4): 6.

[35] Rayner, *op. cit.*, p. 125; Kourides, "Theory of Contracts in Islamic Law", *Columbia Journal of Transnational Law*, Vol. 9:2 (1970), pp. 394-435.

[36] al-Qurṭubī, *al-Jāmiᶜ li Aḥkām al-Qur'ān*, vol. 5, p. 28.

[37] Mahmaṣṣānī, *al-Naẓariyya al-ᶜĀmma*, vol. 2, 378.

d) Debt

The jurists are of different opinions regarding whether debtors are subject to interdiction. According to Abū Ḥanīfa, a debtor is not subject to interdiction even though his debt exceeds his property.[38] Mālik and al-Shāfiᶜī are of the opinion that interdiction is to be imposed on a debtor.[39] The authority of their opinion is a *ḥadīth* by Abū Saᶜīd al-Khudrī, that in the time of the Prophet a man suffered loss in fruits he had bought and his debt increased. The Prophet told the people to give him charity and they gave him charity, but that was not enough to pay the debt in full, so the Prophet said to his creditor:

> "Take what you find. You have no right to anything else."[40]

In order to safeguard the interest of the creditor, an interdiction may be imposed on the debtor as a restriction on him spending his property at his own will, as stated in the *Majalla*:

> "A debtor also, on the application of his creditors, can be prohibited from dealing with his property by the judge."[41]

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[38] al-Zuḥaylī, *al-Fiqh al-Islāmī*, vol. 4, p. 132.

[39] Ibn Rushd, *Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid*, Beirut, 1408H/1988M, vol. 2, p. 284; al-Zuḥaylī, *al-Fiqh al-Islāmī*, vol. 4, p. 132.

[40] al-Nawawī, *Ṣaḥīḥ Muslim bi Sharḥ al-Nawawī*, Beirut, n.d., vol. 10, p. 218; Abū Dāwūd, *Sunan Abū Dāwūd*, Cairo, 1952M/1371H, vol. 3, p. 375; al-Suyūṭī, *Sunan al-Nasā'ī*, Beirut, 1406H/1986M, vol. 7, p. 265.

> "When it is clear to a judge that a debtor is putting off paying his creditors while he has the means to do so, and the creditors demand from the judge the sale of his property and payment of his debts, the judge should prohibit him from dealing with his property."[42]

In this case, it is clear that such interdiction is imposed on the debtor at the request of the creditors who bring the matter to the court. If the debtor still refuses to sell his property and pay his debt, the judge has the power to sell his property and pay his debts.

e) Death sickness

Death sickness or *maraḍ al-mawt* is described as the state of sickness which brings death to the sick person. It is defined in the *Majalla* as:

> "...a sickness, where in the majority of cases death is imminent, and, in the case of a male, where such a person is unable to deal with his affairs outside his home, and in the case of a female, where she is unable to deal with her domestic duties, as long as death occurs before the expiration of one year by reason of such illness, whether the sick person has been confined to bed or not."[43]

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[41] *Majallat al-Aḥkām*, Art. 959.

[42] *Majallat al-Aḥkām,* Art. 998.

[43] *Majallat al-Aḥkām*, Art. 1595.

The degree of a person's legal capacity in his death sickness depends on the type of disposition that he makes. The possibilities can be summarised as follows:

a) Disposition of a person in his death sickness is interdicted in order to safeguard the interests of the person's heirs or creditors.
b) Disposition of a person in his death sickness is deemed valid if it is not in his favour and does not affect his heirs and creditors.[44]

1.7.2 Object of contract (*al-maᶜqūd ᶜalayh*)

In any contract, the object of a contract must be fully satisfied in order to effect a valid contract. The object of a contract is not restricted only to the existence of a physical thing in form and shape, such as the object in a contract of sale, but also includes the object of a contracts in other form, such as benefit in the contract of leasing and profit in the contract of lending property (*ᶜāriya*).[45]

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[44] al-Zuḥaylī, *al-Fiqh al-Islāmī*, vol. 4, pp. 133-138.

[45] Mahmaṣṣānī, *al-Naẓariyya al-ᶜĀmma*, vol. 2, p. 323.

The majority of the jurists agree that four conditions concerning the object of a contract must be fulfilled to effect a valid contract.[46] These are:

a) the existence of the object.

b) that the object is a commodity capable of being given value (*māl mutaqawwim*).

c) that the object is precisely determined as to its essence, its quantity and its value.

d) that the object must be capable of certain delivery.[47]

(a) Existence of the object

The first principle governing the object of a contract is that the object must be in existence at the time of the contract. It is, therefore, illegal to sell a non-existing thing (*bayᶜ al-maᶜdūm*) such as the foetus of an animal before its birth, or fruit which has not yet appeared on the tree, or milk in its udder,

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[46] Ibn Rushd in *Bidāyat al-Mujtahid* stated that the condition of the object of a contract must be free from any element of uncertainty or risk (*gharar*) and element of *ribā*. He emphasized that the meaning of free from element of uncertainty or risk is that the existence, essence and quantity of the object must be known. It must also capable to be delivered safely. As a comparison, Sanhūrī requires more elements to a contract. He elaborates that any contract needs: (1) The congruence of offer and acceptance; (2) The unity (*ittiḥād*) of the *majlīs* of contract; (3) Plurality of contractors *(taᶜaddad)*; (4) The intelligence (*ᶜaql*), or distinction (*Tamyīz*) of the contracting parties; (5) The subject's (*Maḥall*) susceptibility to delivery; (6) The object (*Maḥall*) defined or susceptible to delivery; and (7) The beneficial nature of the object permitd to be traded (*māl mutaqawwim*).

[47] al-Zuḥaylī, *al-Fiqh al-Islāmī*, vol. 4, pp. 356-357.

and the like.[48] The prohibition comes from a *ḥadīth* narrated by Abū Dawūd that Ibn Ḥazm asked the Prophet: "A man asked me to sell him something that I do not have: Should I go and buy it from the market?" The Prophet replied: "Do not sell what you do not have."[49] It also comes from a *ḥadīth* narrated by ᶜAbd Allāh ibn ᶜUmar that the Prophet forbade the selling of fruits until their ripeness was evident, forbidding it both to the seller and the buyer.[50]

The principle of the existence of the object has an exception in the contract of *salam* (*bayᶜ al-salam*)[51] and contracts of *istiṣnāᶜ*,[52] and the selling of fruits at the tree if partial ripening is evident, according to some of the Ḥanafīs.[53]

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[48] al-Zuḥaylī, *al-Fiqh al-Islāmī*, vol. 4, p. 357.

[49] Abū Dawūd, *Sunan Abū Dawūd*, vol. 3, p. 337.

[50] Muslim, *Saḥīḥ Muslim bi Sharḥ al-Nawawī*, Cairo, 1349H/1929M,vol. 10, pp. 177-178; Abū Dawūd, *Sunan Abū Dawūd*, vol. 3, p. 344; Ibn Mājah, *Sunan Ibn Mājah*, vol. 2, p. 746; Aḥmad Ibn Ḥanbal, *al-Musnad*, Cairo, 1313H/1895M, vol. 7, p.196; Mālik, (transmission of Yaḥyā ibn Yaḥyā al-Laythī) *al-Muwaṭṭāʾ*, Beirut, 1409H/1989M, p. 398.

[51] *Bayᶜ al-salam* or sale by advance is the sale of goods in which the price is paid immediately for goods which are to be delivered later, but which are specified in contract.

[52] The *istiṣnāᶜ* contract is a contract in which the purchaser charges the seller to manufacture an object. In this contract no specification of time for delivery of the goods is required.

[53] al-Zuḥaylī, *al-Fiqh al-Islāmī*, vol. 4, p. 357.

(b) The object is a commodity capable of being given value

One requirement of the object of a contract is that it is a property capable of being given value. The *Majalla* defines a commodity capable of being given value or *māl mutaqawwim* as "A thing the benefit of which it is permissible by law to enjoy,"[54] and "a thing which admits of the consequences of a sale, which exists and is capable of delivery."[55] For the purpose of explaining the types of commodities for trading, the jurists have emphasized the prohibited commodities in their writings in the books of *fiqh*. Generally, prohibited commodities are divided into two types: (1) things which are not considered as a commodity such as free human beings, blood and dead meat; and (2) things which are not *mutaqawwim* such as alcoholic drinks (*khamr*) and the flesh of swine (*laḥm al-khinzīr*).[56] All these commodities are impure (*najīs*) and therefore are not permissible by *sharīᶜa* to be enjoyed.

As with other commodities, the prohibition for trading is not due to their impurity but rather, to their inexistence at the time of the contract, as

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[54] *Majallat al-Aḥkām*, Art. 127.

[55] *Majallat al-Aḥkām,* Art. 363.

[56] Commodities are prohibited for trading for several reasons. Some of the commodities are prohibited for trading due to its essence as impure (*najis* or *mutanajjis*) and others are prohibited because these commodities do not constitute property. Articles of public property such as a mosque is also constitute forbidden commodities for trading.

illustrated in the *Majalla,* "A fish in the sea is not *māl mutaqawwim*, but when it is caught and taken it is *māl mutaqawwim.*"[57]

A contract of selling is also invalid in the event of the thing sold not being considered a property. The *Majalla* reads:

> "Selling a thing which cannot be accounted as property among men, or buying that kind of property is invalid. For instance, selling carrion or a free man, or purchasing a property in exchange for them is invalid."[58]

(c) Precise determination of the object of a contract

Another condition regarding the object of a contract is that it must be precisely determined as to its essence, its quantity and its value.[59] If the object of the contract is in the form of performance or benefit, its nature and value must be precisely determined.[60] In the *Majalla* the provisions read:

> "It is necessary that the thing sold should be known to the buyer."[61]

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[57] *Majallat al-Aḥkām*, Art. 127.

[58] *Majallat al-Aḥkām*, Art. 210.

[59] al-Jazīrī, *op. cit.*, p. 178.

[60] Ibn Qudāma, *al-Mughnī li ibn Qudāma*, Beirut, n.d., vol. 4, p. 29.

[61] *Majallat al-Aḥkām*, Art. 200.

"The thing sold becomes known by a description of its qualities and state, which will distinguish it from other things."[62]

It is sufficient, and the sale is valid, if the seller says: "I have sold you this animal," and the buyer while he sees the animal, accepts it. However, if the seller says: "I will sell you one of the animals in my flock," this description is insufficient to deem the contract valid as there is a difficulty in distinguishing the intended animal from all the other objects (animals) in that group.[63]

In a contract of hiring, the thing being hired and the benefit from it are also subject to the condition of precise determination. In this respect, the *Majalla* states:

"The designation of the thing given for rent is necessary. Therefore, if a hiring be made of one of two shops, without giving the choice or designating one of them, the hiring is not valid."[64]

With regard to the benefit of the thing hired, the *Majalla* reads:

"In a contract of hire it is necessary to make known the use to which the thing hired is to be put in such a way as to put a stop to dispute."[65]

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[62] *Majallat al-Aḥkām*, Art. 201.

[63] Rayner, *op. cit.*, p. 140.

[64] *Majallat al-Aḥkām*, Art. 449.

"As regards things like a house, a shop or a wet nurse, the benefit is known by a statement at the time of the hiring."[66]

"When hiring a horse, it is necessary to declare the time or distance for which it is hired, and, at the same time, whether it is for carrying loads, or for riding, and who will ride it, by fixing these or by a general statement that any person the hirer wishes can ride it."[67]

According to the Shāfiᶜīs, precise determination of the object in a contract is very important in order to avoid the element of uncertainty of risk (*gharar*) or the unknown (*jahāla*).[68]

From the above statement it is evident that the precise determination of the object of a contract has received special attention from the jurists of all schools as this condition is important in order to avoid a conflict between the contracting parties. In the event of uncertainty or conflict between them, either party is eligible to rescind or terminate the contract and seek a remedy.

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[65] *Majallat al-Aḥkām*, Art. 451.

[66] *Majallat al-Aḥkām*, Art. 452.

[67] *Majallat al-Aḥkām*, Art. 453.

[68] al-Zuḥaylī, *al-Fiqh al-Islāmī*, vol. 4, p. 393.

(d) Certainty of delivery

The final condition of the object of a contract is that it must be capable of certain delivery. Therefore, a contract of selling birds in the air or fish in the water is invalid.[69] The *Majalla* reads:

> "It is necessary that the delivery of the thing sold be possible."[70]

> "The sale of a thing, the delivery of which is not possible, is invalid. For example, the sale of a ship lying on the sea-bed which cannot be raised, or the sale of wild animal which cannot be caught and delivered, is invalid."[71]

In a contract of an obligation for performance, the performance must be capable of being executed. Therefore, in a contract of hiring, the benefit must be capable of being received. The *Majalla* reads:

> "It is a condition that the benefit must be able to be received. Thus, the hiring of a horse which has run away and is lost is invalid."[72]

The condition that the object is capable of being delivered is related to the status of the commodity itself. The commodity must be in the ownership

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[69] al-Zuḥaylī, *al-Fiqh al-Islāmī*, vol. 4, p. 385.

[70] *Majallat al-Aḥkām*, Art. 198.

[71] *Majallat al-Aḥkām*, Art. 209.

[72] *Majallat al-Aḥkām*, Art. 457.

of the person intending to sell it. Therefore, a contract of selling others' property without their consent or by an unauthorised agent (*bayᶜ al-fuḍūlī*) is not valid.[73] Accordingly, the condition of delivery has ownership of the commodity as a pre-requisite.

1.7.3 The form of the contract

The third constituent element of a contract is the form of the contract (*ṣigha*). *Ṣigha* comprises an offer (*ījāb*) and an acceptance (*qabūl*). It indicates the agreement between the parties in the contract. *Ījāb* is defined by the Ḥanafīs as a statement made in the first place whether it comes from the seller or the buyer.[74] According to the other schools, *ījāb* is a statement that comes from the seller, even though it comes after a statement from the buyer.[75]

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[73] al-Zuḥaylī, *al-Fiqh al-Islāmī*, vol. 4, p. 392.

[74] If the buyer is the first saying, "I sold this thing to you," it is *ijāb*. If the seller is the first saying, "I bought this from you," this is also *ījāb*.

[75] If the seller is the first, saying "I sold you this thing," it is *ījāb*. If the buyer is the first, saying "I bought this thing" and then the seller says "I sold you this thing," the statement of the seller is considered as *ījāb*, event hough the seller is the first person who makes a statement.

Qabūl is defined by the Ḥanafīs as the second statement made by one of the two contracting parties, indicating his agreement to the first statement.[76] According to the other schools, *qabūl* is a statement comes from the buyer even though it comes in the first place.[77] For instance, in a contract of sales, if the buyer says, "I buy these goods from you," and the seller says, "I have sold you the goods," the contract is valid.

The form of the contract is deemed valid through any method which conveys the meaning of contract. It could be in the form of word (*qawl*), acts (*fiʿl*), writing (*kitāba*) and gesture (*ishāra*).[78]

a) Contract in words

For those who are able to talk, word is the form of expression which should be used in agreeing a contract. It is the most common method used by people due to its nature as the easiest means of expression and the strongest clarity in expressing an intention; nor is it restricted to any particular

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[76] The *Majalla*, Art. 102 again adopts a definition by the Ḥanafīs which reads: "Acceptance is a statement made in the second place by the other party which completes the contract."

[77] al-Zuḥaylī, *al-Fiqh al-Islāmī,* vol. 4, p. 93.

[78] al-Zuḥaylī, *al-Fiqh al-Islāmī*, vol. 4, p. 94.

language[79] or any special form of word or sentence.[80] However, the expression must be formed either in the preterite or the present tense.[81]

b) Contract by acts or conduct

A contract by exchange of acts (*al-ᶜaqd bi -l-muᶜāṭā'*) denotes an act from the parties to the contract which indicates an intention to agree the contract. It is also called *al-ṭaᶜāṭī* or *al-murāwaḍa*.[82] The *Majalla* provides that:

> "Since the objective of an offer and an acceptance is the mutual agreement of the two parties, a sale by exchanging of acts (*al-bayᶜ bi- l-mubādala al-fiᶜliyya*) as a sign of agreement is valid."[83]

According to the Ḥanafīs, Mālikīs and Ḥanbalīs, a contract by exchange of acts is valid whether the value of the goods is small or big as long as it

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[79] In this regards, the *Majalla*, in Art. 168 says: "In a sale the offer and acceptance are the words for concluding a sale by the common usage and custom of the place."

[80] The jurists from the various schools agree that in a contract of sales, any expression which means sales such as "I sold you this thing for ten pounds," "I have given you this thing for a certain price", "Take this thing for certain price" make the contract valid. Cf. al-Jazīrī, *op. cit.*, vol. 2, pp. 156-159; *al-Hidāya*, by Marghīnānī, transl. by Charles Hamilton, London, 1975, Book 16, p. 241.

[81] al-Zuḥaylī, *op.cit.*, p. 97; *al-Hidāya*, transl. by Charles Hamilton, Book 16, p. 241; *Majallat al-Aḥkām*, Art. 169 reads: "For the offer and acceptence the past tense is generally used."

[82] al-Zuḥaylī, *op.cit.*, p. 99.

[83] *Majallat al-Aḥkām*, Art. 175.

establishes the mutual consent of the parties.[84] However, according to the Shāfiᶜīs, a contract by exchange of acts is not valid.[85] The standpoint of the Shāfiᶜīs on this matter is that this kind of act cannot clearly indicate the conclusion of a contract due to the ambiguity concerning the consent of the parties.[86]

c) Contract by writing

The Ḥanafīs and the Mālikīs hold that a contract in the form of written document, either by those who are able to talk or unable to talk, *inter praesentes* (*ḥādir*) or *inter absentes* (*ghā'ib*), in any language which is understood by the parties to the contract is valid, on condition that the documents are 'official' [i.e. validated by witnesses] and clear.[87] This opinion is supported by a legal maxim which reads: "Correspondence resembles conversation" (*al-kitāb ka- l-khuṭṭāb*).[88] The *Majalla* provides:

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[84] Ibn Rushd, *Bidāyat al-Mujtahid*, vol. 2, p. 170; al-Zuḥaylī, *al-Fiqh al-Islāmī*, vol. 4, p. 100.

[85] Ibn Rushd, *Bidāyat al-Mujtahid*, vol. 2, p. 170.

[86] al-Zuḥaylī, *al-Fiqh al-Islāmī*, vol. 4, p. 101.

[87] Ibn ᶜĀbidīn, *Radd al-Mukhtār ᶜalā al-Durr al-Mukhtār*, Cairo, 1386H/1966M, vol. 4, p. 13.

[88] *Majallat al-Aḥkām*, Art. 69.

"The offer and acceptance are also made by writing in the same way as they are made by word of mouth."[89]

However, the Shāfiᶜīs and the Ḥanbalīs only recognise written documents in a contract *inter absentes*. They hold that in a contract *inter praesentes*, the parties are able to conclude a verbal contract. Therefore, a written contract is not relevant.[90]

d) Contract by gesture

A contract by gesture is of two kinds: first, a gesture by a dumb person and secondly, by a person who is able to talk. In a case where the parties to a contract are able to talk, a contract by gesture is not concluded, according to the Ḥanafīs and the Shāfiᶜīs. The reason is that a gesture cannot achieve the degree of certainty (*al-yaqīn*) to indicate the intention of the parties.[91] The Mālikīs and the Ḥanbalis, however, recognise a gesture which can be

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[89] *Majallat al-Aḥkām*, Art. 173.

[90] al-Shīrāzī, *al-Muhadhdhab fī Fiqh Madhhab al-Imām al-Shāfiᶜī*, Cairo, 1343H, vol. I, p. 279.

[91] al-Kāsānī, *al-Badā'iᶜ al-Ṣanā'iᶜ fī Tartīb al-Sharāiᶜ*, Beirut, 1402H/1982M, vol. 5, p. 133.

understood by the parties because it is a clearer evidence of mutual agreement than a contract by exchange of acts.[92]

In the case of a contract by a dumb or tongue-tied person (*mu^{c}taqal al-lisān*) whose hand writing is clearly understood, the preferred opinion of the Ḥanafīs is that the contract must be concluded by a written document. But if his hand writing is weak, jurists in all schools arrived at a consensus that a gesture which is clearly understandable is permitted due to necessity (*ḍarūra*), based on a legal maxim which reads: "The recognised signs of a dumb person take the place of a statement by word of mouth" (*al-ishārāt al-ma^{c}hūda li-l-akhras ka-l-bayān bi-l-lisān*).[93] In this respect, the *Majalla* explicitly recognises the known sign by a dumb person as provided: "By the known signs of a dumb person a sale is completed."[94]

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[92] al-Dirdīr, *al-Sharḥ al-Kabīr ^{c}alā al-Mukhtaṣar Khalīl*, Cairo, 1353H/1934M, v. 3, p.134; al-Shirbinī, *Mughnī al-Muḥtāj ilā Ma^{c}rifat Ma^{c}ānī al-Alfāẓ al-Minhāj*, Beirut, 1415H/1994M, vol. 3, p. 212.

[93] *Majallat al-Aḥkām*, Art. 70.

[94] *Majallat al-Aḥkām*, Art. 174.

1.8 The conditions of the format of the contract

A contract is not concluded until all the conditions of the format of the contract are fulfilled. The jurists have outlined three conditions for the offer and the acceptance in order for the contract to be valid:[95]

a) Clarity of the offer and acceptance

An offer and acceptance have to be clear and precise in indicating the intention of the parties to the contract. It can be shown through the words used by the parties or any other permissible form which conveys the meaning of the contract.

b) Consistency of an acceptance with an offer

An acceptance has to be in agreement with an offer on every aspect of the contract, for instance, if a seller says, "I have sold you this thing for ten pounds" and the buyer says, "I have bought this thing for ten pounds." If the buyer does not reply consistently with the offer on the price or the goods or any other aspect of the offer, the contract is not valid. The *Majalla* provides:

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[95] al-Kāsānī, *Badāi*^{c}, p. 134.

"If one of two contracting parties makes an offer for something in any manner whatsoever, the other party must make his acceptance of it so that it exactly corresponds with the offer."[96]

c) Offer and acceptance are connected

A declaration of offer and acceptance from which the contract is concluded must take place at the same time and place (*majlis al-ᶜaqd*). Acceptance must follow immediately after the offer.[97]

1.9 The conditions of the contract

Apart from the constituent element needed to conclude the contract, there are other conditions to be fulfilled for the completion of a contract.[98] These conditions are of paramount important in order to avoid any dispute between the parties resulting from uncertainty (*gharar*) and to preserve their future

[96] *Majallat al-Aḥkām*, Art. 177.

[97] There are three conditions to establish the meaning of a connection between offer and acceptance: 1. Offer and acceptance must be declared in the same *majlis*; 2. There is no indication that any one of the parties to the contract is avoiding the contract, such as inserting unnecessary words which are alien to the contract; 3. The person who makes an offer does not withdraw his offer before the acceptance.

[98] Jurists differentiate between constituent elements (*al-rukn*) and conditions (*al-sharṭ*). According to the Ḥanafīs, the constituent elements are an internal pillar to the existence of something. For instance, reciting the *fātiḥa* in the prayer, or an offer and acceptance in a contract. A condition, however, is an external element to the completion of something. For instance, purity (*ṭahāra*) for performing a *ṣalāt* which is done outside the *ṣalāt*, two witnesses in a marriage contract, or the capability of delivering goods in sales.

interests. The jurists have outlined four kinds of conditions of contract, namely, the conditions of the conclusion of the contract (*shurūṭ al-inᶜiqād*), the conditions of the validity of contract (*shurūṭ al-ṣiḥḥa*), the conditions of the execution of the contract (*shurūṭ al-nafādh*) and the binding conditions of the contract (*shurūṭ al-luzūm*).[99]

a) The conclusion of the contract

The conditions of the conclusion of a contract are the requirement to be fulfilled in order for the contract to be valid in accordance with the law (*munᶜaqidan sharᶜan*). These are of two kinds: general and specific. General conditions are those which apply to every type of contract.[100] Specific conditions are those which apply to certain types of contract only.[101]

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[99] al-Zuḥaylī, *op.cit.*, p. 224.

[100] General condition means a condition that every contract must have. For instance, conditions to the formation of the contract (*sighah*), conditions to the capacity of the parties in the contract (*ahliyya*) and conditions of the object of the contract (*al-maᶜqūdᶜalayh*).

[101] Specific condition mean that the requirement of the condition is only limited to certain types of contract. For instance, the requirement of two witnesses in a marriage contract. Witness is not a requirement in the sales contract.

b) The validity of the contract

The law requires the validity of a contract in order to legalise the consequence of the contract. For sales contracts for example, the Ḥanafīs rule that the contract must be free from six defects (*ᶜuyūb*),[102] namely ignorance,[103] duress,[104] time limitation,[105] uncertainty,[106] damage[107] and *fāsid* conditions.[108]

c) The execution of the contract

The execution of a contract is subject to two conditions:

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[102] Ibn ᶜĀbidīn, *Radd al-Mukhtār*, vol. 3, p.4; al-Kāsānī, *al-Badā'iᶜ*, vol. 7, p.188.

[103] Ignorance must be so excessive that brings into dispute between the parties to the contract such as on the type of the goods, its price, period of option etc.

[104] Duress means an action directed against a person which suppresses his true consent or vitiates his choice.

[105] In a sales contract if a seller says, "I sold you this thing for five pounds for one month," then the contract is void. It is because the purpose of a possession (*milkiyya*) in a valid contract must be free from time limitation (*ᶜadam al-tawqīt*).

[106] It is like a sale of something non-existent such as fish in the water or future object such as future crops.

[107] A classical illustration of damage (*ḍarar*) is the sale of any article which cannot be separated from its original situation without damaging it, such as selling a pillar of a house where delivery is impossible without destroying the house.

[108] Stipulating an irregular condition in a contract, or an uncertain condition, are considered as *fāsid* conditions such as if someone sells a commodity on condition that he will be paid it for as long as he lives.

i) Ownership (*wilāya*). A party to a contract can benefit from a contract only if he has absolute ownership of the object.

ii) That a third party has no claim on the object of the contract. In a case where the right to the object of a contract is shared with a third party who is not involved in the contract, the execution of the contract is suspended, such as the contract of an unauthorised agent (*ᶜaqd al-fuḍūlī*).

d) The binding conditions of the contract

A concluded contract binds the parties to the contract. A binding contract is free from any options (*khiyār)* which permits the parties to rescind the contract. If an option is stipulated in the contract such as option of inspection (*khiyār al-ru'ya*) or option for defect (*khiyār al-ᶜayb*), the contract is not binding on those who have the right of options.

1.10 Options (*khiyārāt*)

The right of option is lawful (*mashrūᶜ*) in order to safeguard the interests of the parties to the contract and to avoid any dispute between them in the future which may cause damage to them. Either party or both may stipulate a condition which permits them an option to rescind the contract or to proceed it. The *Majalla* provides:

"It is permitted to make a condition in a sale, given to the seller or buyer, or both together an option within a fixed time to make valid the sale by assenting to it or to annul it."[109]

The *Majalla* recognises six options. These are the options of: *Majlis*,[110] which takes place within the *majlis*;[111] misdescription (*ṣifa*);[112] non-payment of the price (*naqd*);[113] choice (*taᶜyīn*);[114] inspection (*ru'ya*);[115] and defect

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[109] *Majallat al-Aḥkām*, Art. 300.

[110] *Majlis al-bayᶜ* or *majlis al-ᶜaqd* is the meeting for bargaining between a buyer and a seller. It is provided in the *Majallat al-Aḥkām*, Art. 181, which reads: "The *majlis bayᶜ* is the meeting for bargaining."

[111] *Majallat al-Aḥkām*, Art. 182, which reads: "At the meeting for bargaining, after the offer, until the end of the meeting, both parties have an option."

[112] *Majallat al-Aḥkām*, Art. 310, which reads: "When the seller has sold a property as possessed of good quality, if that property turns out to be without that quality, the buyer has an option."

[113] *Majallat al-Aḥkām*, Arts. 313-315, which reads: "If the buyer and the seller agree that the price shall be paid at such a time, and that if it is not paid, there is no sale between them," "If the seller cannot pay the price at the fixed time, the sale is cancelled," "If the buyer who has the right of the option dies within the time fixed, the sale is cancelled."

[114] *Majallat al-Aḥkām*, Arts. 316-318., To make a sale, for the seller to give which he likes, or the buyer to take which he likes, of two or three things which cannot be found in the market at the same price, when their prices are stated separately, the sale is lawful," "Where there is an option to choose it is necessary that the time is fixed," "A person who has an option to choose must decide the thing taken on the expiration of the time fixed."

[115] *Majallat al-Aḥkām*, Arts. 320-335., Art. 320 provides: "If someone purchases a property without seeing it, he has an option until he has seen it. When he has seen it, if he wishes he annuls the purchase, if he wishes, he accepts," The rest of the provisions are about the method of inspection, inspection on the sample of the property, inspection by blind person, inspection by agent, inspection on moveable property, etc.

(ᶜayb).[116] However, Sanhūrī only recognises four types of options. These are the options of *sharṭ*, *taᶜyīn*, *ru'ya* and *ᶜayb*.[117]

The Islamic right of option has attracted much attention from Muslim jurists and their Western counterparts. Because the right of option can be seen from different points of view, this has given rise to many categories of option. An option is divided into two categories. The first is based on the right to proceed with a contract or rescind it and the second is based on the right to choose an object of contract. Based on the right to proceed with a contract or to rescind it, there are three type of options; namely the option of *sharṭ*, the option of inspection (*ru'ya*) and the option for defect (*ᶜayb*). For the right to choose an object of contract there is only one type of option, namely, the option of choice (*taᶜyīn*).[118]

Rights of option are also divided into two categories:

1. Those which are created by the mutual consent of the contracting parties affecting the formation of the contract, such as the option of acceptance or

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[116] *Majallat al-Aḥkām*, Arts. 336-355. Art. 337 provides: "When it is shown that there is an old defect in a thing sold without any condition, the buyer has an option. If he wishes, he may return it, or, if he wishes, he may take it at the price named."

[117] al-Sanhūrī, *Maṣādir al-Ḥaqq*, vol. 4, p. 198.

[118] al-Zuḥaylī, *al-fiqh al-Islāmī*, vol. 4, p. 250.

rejection within the *majlis*, the option of distinction, and the option to defer payment within a specified time limit.

2. Those which are created by operation of law affecting the binding force of the contract, such as the option for misdescription, the option of inspection and the option for defect.[119]

Coulson divides options into two categories:

1. Those options which "have the purpose of allowing the parties time for reflection," namely, the *khiyār al-majlis* and *khiyār al-sharṭ*;
2. Those which "concern contracts involving a blemish or irregularity and are therefore *fāsid,*" namely, *khiyār al-ᶜayb*, *khiyār al-taᶜyīn*, *khiyār al-naqd* and *khiyār al-ṣifa*.[120]

In a case where a condition is inserted into a contract to give the parties an option, the status of the contract is called not binding (*ghayr lāzim*) or suspended (*mawqūf*), until ratification or cancellation. If the parties give their affirmation to ratify the contract, then it becomes binding (*lāzim*).

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[119] Kourides, *op. cit.*, p. 407; Rayner, *op. cit.*, p. 305.

[120] N.J. Coulson, *Commercial Law in the Gulf States - The Islamic Legal Tradition*, London, 1984, p. 57.

Subsequently, it is their duty to execute the contract. However, in a case of *iqāla*[121] where the contract is valid and free from any conditions of option, a mutual agreement by the parties to terminate the contract will release them from obligations.[122] In exceptional circumstances where the execution of a binding contract has become impossible or excessively difficult, the contract may be subject to premature termination.

1.11 Termination of the contract (*intihā' al-ᶜaqd*)

A contract comes to an end either by cancellation, death or no permission having been given in a suspended contract. Death terminates certain contracts such as leasing (*ijāra*), pledge (*rahn*), agency (*wakāla*) and agricultural contract (*muzāraᶜa*). In a suspended contract such as that of an unauthorized agent (*fuḍūlī*), if there is no permission given by the owner of the object, the contract is terminated.[123] The termination of contracts by cancellation has been the focus of much discussion among jurists because of its special importance and complexity.

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[121] *Iqāla* is defined as an agreement to rescind a contract. The *Majalla*, Art. 163 provides: "*Iqāla* is to annul a contract and put an end to it," Art. 190 provides: "The contracting parties after the making of the contract, can rescind the sale by consent."

[122] al-Zuḥaylī, *op.cit.*, p. 713.

[123] al-Zuḥaylī, *op.cit.*, pp. 276-279; Maḥmaṣṣānī, *al-Naẓariyya al-ᶜĀmma*, vol. 2, pp. 485-490.

1.11.1 Cancellation of a contract (*faskh al-ᶜaqd*)

The cancellation of a contract is subject to the status of the contract. In this respect, jurists have divided contracts into two types; a non-binding contract (*al-ᶜuqūd ghayr al-lāzima*) and a binding contract (*al-ᶜuqūd al-lāzima*).

In the case of a non-binding contract for both parties such as *iᶜāra* (lending property for usage),[124] *sharika* (patnership)[125] and *wakāla* (agency),[126] any party is allowed to cancel the contract as they please. However, in the case of a non-binding contract for one party and a binding contract for the other such as a pledge, a pledgee is allowed to cancel the contract without a consent from the pledgor.[127]

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[124] *Majallat al-Aḥkām*, Art. 806 which reads: "The lender can go back from the loan whenever he wishes."

[125] *Majallat al-Aḥkām*, Art. 1353 which reads: "A partnership is dissolved by the revocation of one of the partners."

[126] *Majallat al-Aḥkām*, Art. 1521 provides: "The principal can dismiss his agent from *wakāla.*" Art. 1522 provides: "The agent can resign the *wakāla.*"

[127] *Majallat al-Aḥkām*, Arts. 716-717. Art. 716 provides: "The pledgee can of his own accord annul the contract of pledge." Art. 717 provides: "Until the consent of the pledgee has been given, the pledgor cannot annul the contract of pledge."

Cancellation of a binding contract is allowed in the following circumstances:[128]

a) Duration of contract ended

A contract is cancelled automatically under two circumstances: if the period of the contract, such as the duration of leasing, comes to an end, and if the purpose of the contract is concluded such as if, in a contract of pledge, a debt is settled by the pledgor.[129]

b) Voidable contract (*fasād al-ᶜaqd*)

In a voidable contract such as the sale of an unknown object (*bayᶜ al-majhūl*),[130] the contract has to be cancelled by the parties or through a court order. However, a voidable contract becomes valid after delivery and a buyer agrees to accept the object.[131]

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[128] al-Zuḥaylī, *op.cit.*, pp. 276-277.

[129] The end of a contract of pledge is indicated by a payment made by the pledgor and establishing possession of the object of pledge by the pledgee. Cf. Hamilton, *Hedāya*, p. 631.

[130] *Bayᶜ al-majhūl* is a sale which is not according to the law in respect of its outside quality (*waṣf*) due to its unknown object. Cf. *Majallat al-Aḥkām*, Art. 364.

[131] *Majallat al-Aḥkām*, Art. 366 provides: "A sale which is *fāsid* becomes valid (*nāfiz*) after delivery. That is to say, a disposition made by the buyer in respect of the thing sold is lawful."

b) Option

In the case of options of *sharṭ*, *ᶜayb* and *ru'ya*, the person who has the right of option is permitted to cancel the contract of his own free will. On the other hand, in the option of *ᶜayb*, if the buyer affirms the sale after discovery of the defect, he is considered to have lost his right of option. His affirmation may be in an explicit manner or tacit as a result of some disposition made by him, or use of the object that can be understood as ownership.[132] In this case, cancellation is not permitted unless the parties agree to cancel the contract.

c) *Iqāla*

Iqāla is defined as the cancellation of a contract by agreement of the parties involved.[133] The cancellation of a sale is lawful provided that a refund equivalent to the original price is made. If either a greater or lesser sum than the original price be stipulated as the condition of the cancellation, such a

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[132] *Majallat al-Aḥkām*, Art. 344 provides: "If the purchaser, after he knows of a defect in the thing sold, acts in a manner which is an exercise of the right of ownership, he has waived his option of defect."

[133] *Majallat al-Aḥkām*, Arts. 163 and 190.

condition is invalid. In this case, the seller must return to the purchaser a sum equal to the original price.[134]

d) Non-performance

The cancellation of a contract on the grounds of non-performance is known in the manuals of *fiqh* under four headings: non-performance under an option of non-payment (*khiyār al-naqd*), non-performance due to the loss of a thing sold before delivery, non-performance due to the impossibility of performance (*istiḥālat al-tanfīz*) and non-performance on the ground of excuses (*iʿdhār*) in a leasing contract.

In an option of non-payment, a contract is cancelled if the seller cannot pay the price at the fixed time of option.[135] An example of non-performance would be in a case where the seller fails to deliver a thing sold due to its loss while in his hand.[136] Impossibility of performance is related to the destruction of a thing sold by a misfortune from heaven (*āfa samāwiyya*). This is referred to under the heading of *quwwa qāhira* (*force majeure*) or *ḥawādith ṭāri'a* (unexpected circumstances). A misfortune from heaven, such as rain, cold or

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[134] Hamilton, *Hedaya*, p. 280.

[135] *Majallat al-Aḥkām*, Arts. 313-314.

[136] *Majallat al-Aḥkām*, Art. 293.

drought which destroys a crop renders delivery of it impossible.[137] In a contract of leasing, non-performance refers to the unexpected excuses (*ṭurū' a^{c}dhār*) on either side or on the object of leasing.[138]

Conclusion

From the early writings of Muslim jurists on the verse "fulfil your obligations," and a *ḥadīth* of the Prophet that "Muslims must honour their agreements" (*al-muslimūn ^{c}alā shurūṭihim*), one can safely deduce that there is a general principle of jurisprudence concerning the law of contracts that Muslims should stand by what they have agreed. This mean that the fulfilment of every contract is obligatory. While we admit that the *sharī^{c}a* recognises the principle of *pacta sunt servanda*, we may ask to what extent the sanctity of a contract is to be observed in the situation where the performance of a contract is excessively onerous due to unexpected circumstances? It seems that the early Muslim jurists have given the answer in their works which we may infer as a basis for the theory of *ḥawādith ṭāri'a*. Nevertheless, we must also admit that in depth discussion on the impossibility

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[137] Mahmaṣṣānī, *al-Naẓariyya al-^{c}Āmma*, vol. I, p. 499.

[138] The theory of excuse (*^{c}udhr*) on leasing is only known in the Ḥanafī school. One of the example to illustrate this theory is that, the lessor is allowed to dispose of the leased property if he becomes so insolvent that he must sell his property.

of performance on the ground of unexpected circumstances has not been treated extensively by early jurists, especially under the ambit of the law of contract. This is understandable as the jurists classified all contracts into classes of nominate contracts (*ᶜuqūd muᶜayyana*), each with its own distinctive rules. However, the theory of unexpected circumstances has been developed by modern jurists in the light of several concepts in nominate contracts such as *al-jawā'iḥ* (calamity) and *bayᶜ al-thimār qabla an yabduwa ṣalāḥuhā* (sales of fruit before its ripeness is evident) in a contract of sale.

CHAPTER II

CHANGE OF CIRCUMSTANCES IN COMMERCIAL TRANSACTIONS

SECTION I : THE THEORY OF *ḤAWĀDITH ṬĀRI'A*

2.0 Introduction

The performance of the obligations of the parties to a valid contract can be frustrated by events beyond their control. Unpredictable events which render performance of the obligations stipulated in the contract extremely onerous are called by Muslim jurists *ḥawādith ṭāri'a.*[1] The equivalent in Western jurisprudence is the theory of changed circumstances[2] which has its

[1] Other terms used by jurists which convey a similar meaning are *ḥawādith istithnā'iyya*, *ẓurūf ṭāri'a, al-aḥwāl al-ṭāri'a, ẓurūf istithnā'iyya* and *ḥādith fujā'i.* See al-Sanhūrī, *Maṣādir al-Ḥaqq*, vol. 2, pp. 20-28, 128-131; al-Zuḥaylī, *al-Fiqh al-Islāmī*, vol. 4, pp. 301-303; Maḥmaṣṣānī, *al-Naẓariyya al-ᶜĀmma*, vol. 2, pp. 397-500.

[2] Change of circumstances is also known as unforeseen circumstances, unexpected circumstances, supervening circumstances and intervening contingencies. The concept is somewhat analogous to the doctrine of *rebus sic stantibus*. See Kourides, "The Influence of Islamic Law in Contemporary Middle Eastern Legal Systems: The Formation and Binding Force of Contract", *Columbia Journal of Transnational Law*, vol. 9:2 (1970), pp. 384-435; A. Amkhan, "The Effect of Change in Circumstances in Arab Contract Law", *Arab Law*

roots in the French theory of "*l'imprévision.*"[3] In general, the theory says that in the event of unexpected circumstances, in which the performance of contractual obligations would be extremely onerous, the contracting parties may ask that the contract be revised, and adjustment made to their obligations to a reasonable limit.

Another important theory which also refers to the non-performance of obligation due to unexpected circumstances is *quwwa qāhira*. However, *quwwa qahira* is distinguished from *ḥawādith ṭāri'a* by the fact that in *quwwa qāhira* the performance is absolutely impossible and so the contractual liability is completely extinguished.[4]

Part one of this chapter deals with the preliminary concept of the theory of *ḥawādith ṭāri'a* with special reference to Islamic commercial transactions. It discusses the background of the theory, its legal foundation in the *sharī^{c}a,*

Quarterly, vol. 9 (1994) pp. 258 - 275; Amin S.H., *Middle East Legal Systems,* Glasgow, 1985, p.184; Walied el-Malik, "The Islamic Concept of Changed Circumstances and its Application to Mineral Agreements", *Yearbook of Islamic and Middle Eastern Law*, vol. 2 (1995), pp. 12-36; Amin S.H., "The theory of changed Circumstances in international Trade", *Lloyd's Maritime and Commercial Law Quarterly*, vol. 4 (1982), pp. 577-584.

[3] Amin S.H., *Middle East Legal Systems*, p.184; Coulson, *Commercial Law in The Gulf States*, p. 88; Ballantyne, "The Sharī^{c}a: A Speech to the IBA Conference in Cairo, on Arab Comparative and Commercial Law", *Arab Law Quarterly*, vol. 2 (1987) pp. 12-28.

[4] Coulson, *ibid.*, p. 88; Amin S.H., *ibid.*, p. 184; al-Sanhūrī, *Maṣādir al-Ḥaqq*, vol. 4, p. 20; Maḥmaṣṣānī, *Naẓariyya al-^{c}Āmma*, vol. 2, p. 498., ^{c}Abd al-Mun^{c}im Faraj al-Ṣadah, "*Naẓariyya al-^{c}Aqd fī Qawānīn al-Bilād al-^{c}Arabiyya*, Beirut, 1974, p. 485.

the scope of the theory and its authority from the Qur'ān and *sunna*. In part two, it deals with the theory of *quwwa qāhira*, which is comparatively similar to *ḥawādith ṭāri'a* with its own distinctive features.

2.1 Definition of the theory of *ḥawādith ṭāri'a*

The word *ḥāditha* [pl. *ḥawādith*] signifies an event, accident, casualty: generally an evil accident or event, a mishap, misfortune, disaster, calamity or an affliction.[5] The word *ṭāri'a* literally means coming or occurring suddenly or unexpectedly.[6] As a new principle,[7] *ḥawadith ṭāri'a* is not referred to specifically in the classical manuals of *fiqh*, therefore there are no classical definitions of the term.[8] As a result, this term has been known and defined interchangeably with *'amr min Allah* (Act of God),[9] *āfa samawiyya*

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[5] E.W. Lane, *Arabic-English Lexicon*, Cambridge, 1984, p. 528

[6] *Ibid.*, p. 1835.

[7] Some modern writers do not agree that *ḥawādith ṭāri'a* is treated as a legal principle in the strict sense but rather to treat such changed circumstances as a cause giving rise to an effect. See Amkhan, "The effect of Change in Circumstances in Arab Contract Law," *Arab Law Quarterly*, vol. 9 (1994), pp. 258-275.

[8] Coulson, *op. cit.*, p. 83; El-Malik, *op. cit.*, pp. 12-36.

[9] It is an act occasioned exclusively by violence of nature without the interference of any human agency. It means a natural necessity proceeding from physical causes alone without the intervention of man. It is an act, event, happening or occurrence, due to natural causes and inevitable accident or disaster.

(misfortune from Heaven), *quwwa qāhira* (*force majeure*), and even the doctrine of frustration by modern jurists.[10]

For the purpose of this study and for the sake of consistency, the theory of *ḥawādith ṭāri'a* is defined as provided in the Egyptian Civil Code 1949 as follows:

> " When, however, as a result of exceptional and unpredictable events of a general character, the performance of the contractual obligation, without becoming impossible becomes excessively onerous in such a way as to threaten the debtor with exorbitant loss, the judge may, according to the circumstances, and after taking into consideration the interests of both parties, reduce to reasonable limits the obligation that has become excessive."[11]

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[10] In this regard, Coulson uses the term "frustration" to indicate a situation in which a contracting party due to unexpected circumstances outside his control, finds the performance of his contractual obligations either to be impossible or to entail an unforeseen burden. For detail see Coulson, *op. cit.*, pp. 82-93. The term also brings various translation which indicates the uncertainty of the application of the term in a specific way. For further reading see al-Sanhūrī, *Maṣādir al-Ḥaqq*, vol. 4, pp. 20-28, 90-110; al-Zuḥaylī, *al-Fiqh al-Islāmī*, vol. 4, pp. 301-303; Amkhan, "The Effect of Change in Circumstances in Arab Contract Law", *Arab Law Quarterly*, vol. 9 (1994) pp. 259-275; Abd al-Rasul Abd al-Redha, "The Principle of Pacta Sunt Servanda and Liability for Hidden Defects", *Arab Comparative & Commercial Law*, vol. 1,1987, pp. 60-84; Amin.S.H., "The Theory of Changed Circumstances in International Trade", *Lloyd's Maritime and Commercial Law Quarterly*, 4 (1982), pp. 577-584; Samir A. Saleh, "Some Aspects of Frustrated Performance of Contracts Under Middle Eastern Law", *International and Comparative Law Quarterly*, vol.33 (Oct. 1984), pp. 1046-1051; Abd El-Wahab Ahmed El-Hassan, "Freedom of Contract, The Doctrine of Frustration, and Sanctity of Contracts in Sudan Law and Islamic Law", *Arab Law Quarterly*, vol. 1 (1985-1986) pp. 51-60; El-Malik, *op. cit.*, pp. 12-36.

[11] Egyptian Civil Code 1949, Art. 147(2).

The theoretical basis behind this legislation is on the one hand the existence of an implied term that the contract should cease to be binding in the event of unexpected or unforeseeable circumstances and on the other hand the need to impose the principle of justice and equity by providing a reasonable solution accordingly. Therefore, if after the contract has been concluded, unforeseen or unexpected circumstances occur which render performance impossible or, if possible at all, so different and changed from that which the parties agreed upon during the time of the conclusion of the contract, the contract may be deemed frustrated and the parties discharged from their duties to perform any further.

2.2 The Background of the theory of *ḥawādith ṭāri'a*

The theory of *ḥawādith ṭāri'a* is said to have its origins in medieval ecclesiastical law which was based on the understanding of justice found among the churchmen. The framework of the theory in that law was built around the doctrine of changed circumstances (*rebus sic stantibus*) which requires that the circumstances at the time of the conclusion of a contract and the circumstances at the time of the execution must not be radically different. In this regard, if such a change makes the performance of the obligation of the parties onerous, the parties are not bound to perform the obligation.

Therefore, adjustment has to be made to the contract in order to make the performance of the obligations by the party less onerous.[12]

In modern times, the theory of *ḥawādith ṭāri'a* was originally enacted in private law but later it was abolished and reenacted in public law. In public international law, the modern theory of changed circumstances is applied in international treaties.[13] However, it seems that the theory has never been widely accepted and its application has also been very limited. Accordingly, international treaties are subject to an implied condition that if there occurs a material change to the circumstances under which the agreement was made, and if by an unforeseen change in circumstances an obligation provided for in the treaty should imperil the existence or vital development of one of the parties, the party is entitled to claim release from the obligation concerned.[14]

The principles are expressed in Article 62 of the Vienna Convention as follows:

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not

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[12] al-Sanhūrī, *Maṣādir al-Ḥaqq,* vol. 6, p. 21., al-Ṣadah, *op. cit.*, p. 479.

[13] al-Sanhūrī, *Maṣādir al-Ḥaqq*, vol. 6, , p. 23.

[14] Amin, S.H., "The theory of changed circumstances in international trade", *Lloyd's Maritime and Commercial Law Quarterly*, vol. 4 (1982), pp. 577-584., el-Malik, *op. cit.*, pp.12-36.

foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

(a) if the treaty establishes a boundary; or

(b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.[15]

An example of a fundamental change would be the case where a party to a military and political alliance, involving the exchange of military and

[15] I. Brownlie, *Principles of Public International Law*, Oxford, 1990, pp. 619-620.

intelligence information, has a change of government incompatible with the basis of alliance.[16]

The theory was then shifted from public law to administrative law. It was during the First World War that the Parliament of France adopted the theory in the case of a gas company in Bordeaux which had been assigned to supply gas to the city at a fixed price. After some time the price of the gas had increased from Fr. 28 per tonne in 1913 to Fr. 73 in 1915, as the World War broke out. When the matter was brought forward to the parliament it was decided that the contract had to be adjusted to suit the new price.[17]

Finally, the theory of *ḥawādith ṭāri'a* appeared within the scope of private law and was enacted in modern civil codes. The Polish Civil Code was the first literal source of the theory of *ḥawādith ṭāri'a* in Article 269, followed by Article 1467 of the new Italian Civil Code.[18]

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[16] *Ibid.*, p. 620.

[17] al-Sanhūrī, *Maṣādir al-Ḥaqq,* vol. 6, p.23., al-Ṣadah, *op. cit.*, p. 480. It is worth noting that in France, administrative law is not codified. Therefore, it is largely judge-made law (*droit prétorien*). It is nevertheless a flexible system, tailored for particular circumstances. This enables it to strike a balance between the administrator's need for efficiency and the citizen's need for protection. For that reason, it has a high degree of legal uncertainty.

[18] al-Sanhūrī, *Maṣādir al-Ḥaqq*, vol. 6, p. 24.

In the Muslim world, Egypt was the first country to adopt the theory in the new Egyptian Civil Code.[19] It was followed by Syria,[20] Jordan,[21] Iraq,[22] Kuwait[23] and Yemen,[24] where the provisions were almost identical with that of the new Egyptian Civil Code. Indeed, most countries in the Arab world share the same legal codes except in a few provisions where a different jurisprudential tradition is followed.[25] The basic rule is that, when unforeseen and exceptional circumstances of a widespread and general character result in the inability to perform a contractual obligation in the way originally envisaged (even though performance is not intrinsically impossible) and a contracting party adduces evidence to show that performance is likely to result in exorbitant loss, then the court may vary the contractual obligations so as to make them reasonable in the new situation.[26]

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[19] Egyptian Civil Code 1949, Art. 147(2).

[20] Syrian Civil Code 1949, Art. 148(2)

[21] Jordan Civil Code 1976, Art. 205.

[22] Iraqi Civil Code 1951, Art. 146(2).

[23] Kuwaiti Civil Code 1980, Art. 146.

[24] Yemen Civil Act 1992, Art. 214.

[25] For example, the Syrian Civil Code closely followed the Egyptian Civil Code except in the provisions relating to real estate and proof. See F.J. Ziadeh, *Property Law in the Arab World*, London, 1979, p. 11.

[26] Saleh, *op. cit.*, pp. 1046-1051.

2.3 The basic purpose behind the legislation

Once a contract has been concluded, parties to the contract are bound to fulfil their obligations.[27] They are assumed by the law to have given their consent to the conditions which are stipulated in the contract. However, within the duration of the contract, the circumstances which motivated the contract might radically change. The economic environment which is one of the main factors influencing the conclusion of a contract might change. Currency fluctuation due to economic instability might cause one of the parties in the contract to suffer a severe loss. Furthermore, the political stability which motivated the parties to come into the contract might change due to a change of government. Apart from these changes caused by human agency, an act of God, such as flooding, drought, an earthquake, locusts, frost or any unforeseen circumstances, can result in the inability to perform a contractual obligation as originally stipulated in the contract. This could bring heavy loss to the parties in the contract.

As the contracts must be performed in good faith, and following the view that a contract must always be performed in accordance with the intention of

[27] Q., *al-Nisā'* (4):29

the parties[28] , a condition *rebus sic stantibus* must always be read into every contract.

2.4 *Ḥawādith ṭāri'a* in Islamic jurisprudence

It is commonly agreed that a general theory of unexpected circumstances is not found in the authoritative texts of traditional *fiqh*. Al-Sanhūrī has pointed out two reasons for the lack of general principles, not only in *ḥawādith ṭāri'a* but also in Islamic jurisprudence in general. According to him:

> "It is difficult to say that Islamic jurisprudence constructed a theory relating to "unforeseen circumstances" equivalent to the theory in modern Western jurisprudence. Two reasons prevented that: the first is that Islamic jurisprudence does not, whether in the theory of unforeseen events or in any other theory, subscribe to general principles. We have stated previously that Islamic jurisprudence and all other early systems only treats with matters case by case, and propounds therefore just practical solutions, creating therein a hidden current of legal reasoning. The researcher must uncover such a current and must construct an appropriate theory supported by sound legal principles from the various solutions established by various cases; thus is constructed a building with sound cornerstones. The second reason is that Western jurisprudence was compelled to propound a general theory for unforeseen circumstances, because the

[28] *Majallat al-Aḥkām*. Art. 3.

force of a binding contract in such jurisprudence has been exaggerated, calling for the establishment of methods to alleviate the same in accordance with the requirements of justice. Such exaggeration (i.e., in the sanctity of contract) being subject to the influence of individual authority, and such alleviation being under the influence of social or collective security. As for Islamic jurisprudence, where the requirements of justice always rule when coming into conflict with the binding force of a contract, it has managed in the light of such requirements to open various gaps in the binding force of a contract without the jurists seeing any need to propound a theory in justification thereof, as long as the requirement of justice can customarily be invoked to provide for any such justification."[29]

Muslim jurists, in their effort to uncover a hidden current of legal reasoning for *ḥawādith ṭāri'a*, have argued for several foundations supporting the theory from the point view of the *sharī'a*. They are of the opinion that the theory is founded on the principles of justice and equity as contracts must be implemented and performed in good faith. There are elements of injustice and oppression if the debtor has to pay his debt in a situation where the performance is extremely onerous due to unexpected circumstances which are beyond his expectations. They stress that the debtor should not be obliged to pay compensation unless the difficulty was expected at the time of the

[29] al-Sanhūrī, *Maṣādir al-Ḥaqq*, vol. 6, p. 90 [as translated by W.M. Ballantyne in "The Sharī'a: A Speech to the IBA Conference in Cairo, on Arab Comparative and Commercial Law", *Arab Law Quarterly*, vol. 2 (1987) pp. 12-28.

conclusion of the contract.[30] The requirement of justice also drew Ibn Taimiyya's attention to the problem of losses arising out of *ḥawādith ṭāri'a*. He states:

> "If a person hires land for cultivation and the crops are ready but, before he harvests them or takes them to his place they are destroyed, then a distinction must be made between events caused by nature and those caused by man. The contract is invalid if the destruction occurs due to natural factors."[31]

Another judicial basis underlying the theory of *ḥawādith ṭāri'a* is the need to balance the rights and obligations of the contracting parties which motivates the doctrine of *istighlāl* (unfair advantage) and *al-ithrā' bilā sabab* (unjustified enrichment).[32] In this regard a judge is allowed to make an adjustment to the contract in order to prevent the creditor from getting rich at the expense of the debtor.

The foundation of the theory can also be ascribed to the principle of injustice using a right (*al-taᶜassuf fī istiᶜmāl al-ḥaqq*). A creditor has committed an injustice in exercising his right when he forces a debtor to fulfil

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[30] al-Sanhūrī, *Maṣādir al-Ḥaqq*, vol. 6, p. 22; See also al-Ṣadah, *op. cit.*, p. 479.

[31] A.A. Islahi, *Economic Concepts of Ibn Taimiyya*, Leicester, 1988, p. 165.

[32] al-Sanhūrī, *Maṣādir al-Ḥaqq*, vol. 6, p. 22; Rayner, *op.cit.*, p. 261; See also al-Ṣadah, *op. cit.*, p. 479.

obligations which are excessively onerous due to unexpected circumstances that neither of them are able to predict.[33]

Even though jurists have suggested several reasons to justify the foundation of the theory, they strongly believe that the theory of *ḥawādith ṭāri'a* has its own foundations in the *sharī^{c}a* under the ambit of *maṣāliḥ mursala* (public interest).[34] A calamity such as a strong wind, locusts, drought and the like, is not new to human history and men have enacted many laws to deal with such problems and the laws change to suit the time. In this regard, the eminent Muslim jurist, Ibn Khaldūn strongly promotes public interest as a basis for legislation in the *sharī^{c}a* in order to suit the changing times as stated in his *Muqaddima*:

> "In view of the fact that the interest of the people is the basis of all laws, it is both necessary and reasonable that *sharī^{c}a* rules should undergo changes to suit the changing times, and that these rules be affected by social organisation and the environment."[35]

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[33] al-Sanhūrī, *Maṣādir al-Ḥaqq*, vol. 6, p. 22; al-Ṣadah, *op. cit.*, p. 479.

[34] Mālik accepts *maṣāliḥ mursala* as one of the sources of the *sharī^{c}a*. According to this method, a particular rule will be related to the appropriate meaning which is consonant with the general practices of the *sharī^{c}a*; in other words, to consider the reasonable meaning which conforms to the public interest and to the intent of the *sharī^{c}a*, and then to formulate a rule that such a meaning requires.

[35] Ibn Khaldūn, *al-Muqaddima*, [as cited in el-Malik, "The Islamic Concept of Changed Circumstances and its Application to Mineral Agreements", *Yearbook of Islamic and Middle Eastern* Law, vol. 2 (1995) pp. 12-36.

The most obvious foundation in the *sharīᶜa* for the theory of *ḥawādith ṭāri'a* comes under the scope of *ḍarūra* (necessity). The doctrine of *ḍarūra* was originally applied in the area of ritual obligation.[36] However, it is widely accepted by jurists that the doctrine has general application. It means that the rules of law are general in nature, considering all situations and all individuals. However, in certain circumstances, this characteristic renders the application of the rules very difficult to certain people, with the result that strict adherence to rules turns into injury and injustice. Therefore, it becomes necessary to lighten the burden and ignore the general rules in exceptional circumstances if their application would bring hardship and injustice.[37] In such circumstances the doctrine of *ḍarūra* is applied. A general maxim which illustrates the application of the doctrine of *ḍarūra* reads: "Necessity renders prohibited things permissible."[38] From this maxim, there are several other maxims which convey a similar meaning. The *Majalla* has incorporated the maxim "hardship begets facility; that is to say difficulty is a reason for easiness, and in time of urgency, latitude must be shown."[39] It is worth

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[36] Classic examples of the doctrine of *ḍarūra* are when a hungry person eats the meat of a dead animal, or a thirsty person drinks wine or a sick person uses wine as a medicine. See Ibn Rushd, *Bidāyat al-Mujtahid*, vol. I, p. 381.

[37] Maḥmaṣṣānī, *Falsafat al-Tashrīᶜ fī al-Islām*, [English translation by Ziadeh F.J] Malaysia, 1987, pp. 152-153.

[38] al-Suyūṭī, *al-Ashbāh wa al-Naẓā'ir fī Qawāᶜid wa Furūᶜ Fiqh al-Shāfiᶜiyya*, Cairo, 1378H/1959, p. 60; See also *Majallat al-Aḥkām*, Art. 21.

[39] *Majallat al-Aḥkām*, Art. 17.

pointing out that the decisive factor in recommending the theory of *ḥawādith ṭāri'a* as stated in the memorandum for the new Egyptian Civil Code is the doctrine of *ḍarūra*.[40]

It is also the case in Islāmic law that every injurious act inflicted in any form which causes loss and suffering (*ḍarar*) is prohibited and should be avoided as far as possible. In the light of this tenet, jurists expounded the maxim "Injury must be removed."[41] In situations where an unexpected event may bring loss and suffering to any party, such a doctrine is needed to avoid greater loss to the parties involved. Other maxims which include the same meaning are: "Injury cannot be inflicted with the same amount of injury,"[42] "An injury should not be removed by another injury,"[43] and "An injury should be removed as far as possible."[44]

The prohibition of *gharar* (uncertainty risk) and *ribā* (interest) as the most fundamental principles in Islāmic commercial law should not be ignored in looking into the foundation of the theory *ḥawādith ṭāri'a*. It is due

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[40] Kourides, *op. cit.*, pp. 384-435.

[41] *Majallat al-Aḥkām*, Art. 20.

[42] *Majallat al-Aḥkām*, Art. 19.

[43] *Majallat al-Aḥkām*, Art. 25.

[44] *Majallat al-Aḥkām*, Art. 31.

to the fact that, in the event of *ḥawādith ṭāri'a*, elements of uncertainty and gaining benefit unlawfully are so obvious. In this respect, Coulson has agreed that:

> "It is vital to appreciate that this general doctrine of frustration stems from what is certainly the most fundamental principle of traditional *sharīᶜa* contract law - namely, the prohibition of *ribā*. In its broadest sense *ribā*, as we have seen, means a gain or advantage accruing to a contracting party which is illicit because proper consideration for it has not been provided. Expressed in a positive form this principle means that contractual rights and duties must be precisely specified and that any element of risk or uncertainty which would upset the contemplated balance of the rights and duties of the parties under the contract must be eliminated."[45]

It should be noted that the flexibility of the *sharīᶜa* as accepted by the majority of jurists has laid strong foundations for the acceptance of the theory of *ḥawādith ṭāri'a*. As the objective of the *sharīᶜa* is to secure the welfare of the people by promoting their benefit or by protecting them against harm, the acceptance of the theory of *ḥawādith ṭāri'a* is justified. This view is supported by the fact that *ijtihād* or personal reasoning in the event of nothing being found in the Qur'ān or the *sunna*, is validated by the Qur'ān and the *sunna*. Even during the life of the Prophet himself, the exercise of *ijtihād* was permissible and the *ḥadīth* of Muᶜādh ibn Jabal on his appointment as a *qāḍī*

[45] Coulson, *op. cit.*, p. 87.

in Yemen provides a clear authority for it. In this event, the Prophet, on the appointment of Mu^{c}ādh, asked him:

> "How are you going to give judgement?" He replied: "With (the guidance) of the Qur'ān." The Prophet ask him again: "If you cannot find it in the Qur'ān?" He replied: "I will refer to the *sunna* of the Prophet." The Prophet asked him: "If you cannot find it in the *sunna*?" He replied: "I will exercise my own personal reasoning, but I will not exceed the limit."[46]

2.5 *Ḥawādith ṭāri'a* in early *fiqh*

As mentioned earlier, the theory of *ḥawādith ṭāri*^{c}*ah* has no classical definition in the classical texts of *shari*^{c}*a*. This is a natural result of the fact that *ḥawādith ṭāri'a* is not known in early *fiqh* as a general theory. Nevertheless, it does not mean that the *sharī*^{c}*a* is silent on the matter of unexpected or unforeseeable circumstances. A close look at early jurists' works, especially in the context of the various nominate contracts, reveals that the existence of the concept of unexpected or unforeseeable circumstances in the *shari*^{c}*a* is unquestionable. In fact, the theory of *ḥawādith ṭāri'a* can be traced back as early as the time of the Prophet, from whom various *ḥadīths* on the matter are recorded. The jurists then dealt in general

[46] Abū Dāwūd, *Sunan Abū Dāwūd*, vol. 3, p. 1019.

term with hypothetical cases on the impossibility of performance or difficulty to fulfil a contractual obligation due to unexpected circumstances.

2.5.1 Cases involving *ḥawādith ṭāri'a* in early *fiqh*

A general picture of *ḥawādith ṭāri'a* comes to light from certain events which occurred among the Companions during the life time of the Prophet. These cases are recorded in many *ḥadīth* which can be considered as a precedent and important source for establishing the theory of *ḥawādith ṭāri'a*. One case is reported in the *Muwaṭṭā'* as follows:

> "It is related from Mālik that Abū Rijāl Muḥammad ibn ᶜAbd al-Raḥmān heard his mother ᶜAmra bint ᶜAbd al-Raḥmān say that a man bought the fruit of an enclosed orchard in the time of the Prophet and tended it while staying on the land. It became clear to him that there was going to be some loss. He asked the owner of the orchard to reduce the price for him or to revoke the sale, but the owner made an oath not to do so. The mother of the buyer went to the Messenger of Allāh and told him about it. The Messenger of Allāh said: "By his oath he has sworn not to do good." The owner of the orchard heard about it and went to the Messenger of Allāh and said: "O Messenger of Allāh, the choice is his."[47]

[47] al-Suyūṭī, *Muwaṭṭā' al-Imām Mālik*, vol. 2, p. 52.

In another case:

> "It is related from Zayd ibn Thābit that people used to trade in dates in the lifetime of the Prophet. When they cut their fruits and the purchasers came to receive their goods the sellers said, "My dates have got rotten; they are blighted with disease, and are afflicted with *quthām* [a disease which causes the fruit to fall before ripening]." They kept on complaining of defects in their purchases. The Prophet said: "Do not sell the dates before their ripeness is evident," advising them as they were quarrelling too much."[48]

2.5.2 Hypothetical cases of *ḥawādith ṭāri'a* in early *fiqh*

Under the concept of *waḍ' al-jawā'iḥ*, a general theory of *ḥawādith ṭāri'a* was expounded by early jurists in the Māliki, Shāfi'ī and Ḥanbalī schools. They recognised that when an agreement for the sale has been concluded but the execution of the obligation has become so onerous or impossible due to unexpected circumstances, the contractual obligation is subject to modification. Even though they are of different opinions as to the exact solution to the problem, there is no dispute among these three schools about their acceptance of *waḍ' al-jawā'iḥ* a result of unexpected circumstances.[49]

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[48] al-'Asqalānī, *Fatḥ al-Bārī bi Sharḥ Ṣaḥīḥ al-Bukhārī*, Beirut, 1405H/1985M, vol. 4, pp. 313-314; Abū Dawūd, *Sunan Abū Dawūd*, vol. 3, p. 345.

[49] Ibn Rushd, *Bidāyat al-Mujtahid*, vol. II, pp. 186-187., al-Shāfi'ī, *al-Umm*, Beirut, n.d., vol. 3, p. 59.

It is interesting to note that the Ḥanafīs do not accept the concept of *waḍ*^{c} *al-jawā'iḥ*. However, the Ḥanafīs recognise the theory of *ḥawādith ṭāri'a* through the concept of ^{c}*udhr* (excuse) under the general heading of hire (*ijāra*) which includes both the hiring of property and contracts for services. Under this concept, the theory of *ḥawādith ṭāri'a* is discussed through hypothetical cases in the classical Ḥanafī texts. Referring to the contract of hire, Ibn Qudāma states:

> "A contract of hire for the digging of a well is valid. But it is essential that the work to be done is defined in terms either of a period of time or a specific job. If the employer defines the work by a period of time, saying, for example: 'I hire you for a month to dig a well for me,' then the contractor does not need to know the amount of work required to dig the well. His obligation is simply to dig for that month whether the resulting amount of digging be small or great. But he does need to know the ground in which he is to dig, because the ground may be hard and make the digging difficult, or it may be soft and make the digging easy.
>
> Where, however, the employer defines the work as a specific job then it is essential for the contractor to have knowledge of the site by inspection: for sites differ in ease and difficulty, the degree of which cannot accurately be determined by description. He must also know the circumference and depth of the well because this makes a difference to the work involved.
>
> Should the contractor strike hard rock or mineral ore which makes normal digging impossible then he is not bound to continue

digging, because this is a situation different to that which was assumed from his inspection of the terrain. Inspection of the terrain applies only to the obvious difference between sites. If the ground proves to be of a nature different to that which was apparent from the inspection, then the contractor has the option to rescind.

In cases of rescission the contractor has a right to such part of the contract sum as is proportionate to the work done, while the hire price itself lapses both as regards the work remaining and the work actually done. It may be asked: What is the amount of the consideration for the work done and for the work that remains, in regard to both of which the stipulated consideration has lapsed? This cannot be calculated solely on the basis of the footage dug, because it is relatively easy to remove the earth from the higher part of the well and relatively difficult to remove it from the lower part.

Should underground water be encountered and render normal digging impossible, the situation is analogous to the striking of hard rock and is to be regulated upon the same principle."[50]

In another hypothetical case, to illustrate a type of 'misfortune from Heaven' and the solution thereof, Ibn Qudāma states:

"In a situation where a crop is destroyed by flood, fire, locusts or such like, the lessor is not liable in damages nor is there any right of option granted to the lessee. If the lessee's property is destroyed

[50] Ibn Qudāma, *al-Mughnī*, vol. 5, p. 422.

in such circumstances, the situation is analogous to the case where someone hires a shop and his goods catch fire therein."[51]

Early jurists elaborate the meaning of unexpected circumstances through another hypothetical case where a person hires a house or shop and afterwards the lessor becomes poor and involved in debt to such a degree that he is unable to discharge his debt unless he sells the house or shop. In this case, the judge must dissolve the contract and sell the place for payment of the debt.[52]

To sum up, it can be said that according to the classical texts, unexpected circumstances include any supervening circumstances which were unforeseen by the contracting parties at the time of the contract and which would render it impossible to carry out the contract without inducing an injury or hardship to one or other party. It can also be concluded that the theory of *ḥawādith ṭāri'a* is recognized in the *sharī'a* in a general but comprehensive way.

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[51] *Ibid.*, vol. 5, p. 445.

[52] Hamilton, *Hedāya*, p. 511.

2.6 Constituent elements of *ḥawādith ṭāri'a*

The jurists have outlined several essential elements for events to be qualified as *ḥawādith ṭāri'a*. According to al-Sanhūrī, there are four constituent elements to be fulfilled to constitute the theory of *ḥawādith ṭāri'a*. These elements are: that the contract is a normal contract, that the event should be exceptional and of a general character, that this exceptional event must be unpredictable and, that such an event should render the performance of the obligations onerous but not impossible.[53]

2.6.1 The contract being normal in nature

For an event to come under the category of *ḥawādith ṭāri'a*, it must happen in a normal contract, that is, a contract where there is a period of time between the conclusion of the contract and the execution of the contract. It includes:

a) a contract where the execution of the contract covers a certain period of time, such as a contract of leasing.

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[53] al-Sanhūrī, *Maṣādir al-Ḥaqq*, vol. 6, pp. 25-26.; See also al-Zuḥaylī, *al-Naẓariyya al-Ḍarūra al-Shar^{c}iyya Muqāranah ma^{c}a -l-Qānūn al-Waḍ^{c}ī*, Beirut, 1979/1399, pp. 318-319. It should be noted that al-Zuḥaylī differs slightly from al-Sanhūrī regarding the type of the contract. Al-Zuḥaylī sees that the contract should not be a probable contract (*al-^{c}aqd al-iḥtimālī*). That is to say that the contract is not something to happen in the future in the sense that the time when the obligation starts or the particulars of the contract are not known yet, e.g., a contract of sale of fruit before its ripening is evident.

b) a periodical contract, such as a contract to import goods on a regular basis.

c) an immediate contract, but where the execution of the contract takes place at a later time.

In such a period of time, if the unexpected event occurs which renders performance so different and changed that it would not be at all what the parties had contemplated and their bargain would in fact be radically different, it may come under the category of *ḥawādith ṭāri'a*.[54]

2.6.2 The event being exceptional and of a general character

For an unexpected event to come under the category of *ḥawādith ṭāri'a*, it must be an exceptional one of general character. This refers to events with a widespread effect on the contract to be performed and not merely to the contracting parties themselves, such as an earthquake, a freak storm, locusts, cold, drought or an epidemic. Accordingly, events which relate only to the

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[54] al-Sanhūrī, *Maṣādir al-Ḥaqq*, vol. 6, p. 25; al-Ṣadah, *op. cit.*, pp. 482-483.

contracting party, such as his bankruptcy, death or the burning of his property, may not be relied on to invoke the theory of *ḥawādith ṭāri'a*.[55]

It is to be noted that this type of unexpected event is not confined to the so called 'misfortune from Heaven', but also includes events, such as a sudden riot, a general strike, new legislation, a sharp rise in the prices of a certain commodity and such-like.[56] In spite of that, whether or not an event is of an exceptional character is a question to be decided by the court.

2.6.3 The event being unpredictable

An event must be unpredictable or unforeseeable in order to be considered as a *ḥaditha ṭāri'a*. This is to say that the event must not have been anticipated or foreseen at the time of the conclusion of the contract. The measure to determine the element of unpredictability is that a normal person would have not foreseen it had he been in the same position as the contracting parties at the time of the contract.[57] Having said that, the flooding of the Nile

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[55] al-Sanhūrī, *Maṣādir al-Ḥaqq*, vol. 6, pp. 25-26; al-Ṣadah, *op. cit.*, pp. 483-484; El-Walid, *op. cit.*, pp. 12-36; Amkhan, "Change in Circumstances in Arab Contract Law", *Arab Law Quarterly*, vol. 9 (1994), pp. 258-275; Kourides, *op. cit.*, pp. 384-435.

[56] al-Sanhūrī, *Maṣādir al-Ḥaqq*, vol. 6, p. 26; al-Ṣadah, *op. cit.*, pp. 483-484; Amkhan, "Change in Circumstances in Arab Contract Law", *Arab Law Quarterly*, vol. 9 (1994) pp. 258-275.

[57] Amkhan, "Change in Circumstances in Arab Contract Law", *Arab Law Quarterly*, vol. 9 (1994), pp. 258-275.

or the spreading of the cotton worm would not suffice to fulfil the element of an unforeseen event, since they are predictable.[58]

2.6.4 The performance being onerous

The final element to constitute the theory of *ḥawādith ṭāri'a* is that the contractual obligation should have become excessively onerous as a direct result of the unexpected event. In this regard continued performance will cause the contracting party an exorbitant loss. Whether the performance of a contract is excessively onerous should be determined on the merit of the case. It is not measured in the light of the general wealth of the debtor but in regard to the subject matter of the contract under consideration.[59]

It is also important to mention that the determination of the hardship caused by an unexpected event is made by the court upon the request of the contracting party. The court should then make an adjustment to the contract accordingly.[60]

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[58] al-Sanhūrī, *Maṣādir al-Ḥaqq*, vol. 6, p. 26; Kourides, *op. cit.*, pp. 384-435.

[59] al-Sanhūrī, *Maṣādir al-Ḥaqq*, vol. 6, p. 26; Amkhan, "Change in Circumstances in Arab Contract Law", *Arab Law Quarterly*, vol. 9 (1994), pp. 258-275.

[60] Amkhan, "Change in Circumstances in Arab Contract Law", *Arab Law Quarterly*, vol. 9 (1994), pp. 258-275.

2.7 Legal effects of *ḥawādith ṭāri'a*

In the event of *ḥawādith ṭāri'a*, the most important aspect from a *sharī*ᶜ*a* point of view is the status of the contract concluded before the event and the obligation thereof. Such legal aspects are derived from the meaning of the *ḥadīth* of the Prophet in the *ḥadīth* of ᶜAmra.[61] It seems that the status of the contract is subject to amendment through the agreement of both parties in the contract as offered by the owner of the orchard. It is also clear that the contract is revocable to a certain degree. Consequently, the obligation of the contract is subject to adjustment through the reduction of the price.

In the light of the *ḥadīth* of ᶜAmra, if the elements of *ḥawādith ṭāri'a* are fulfilled and the parties seek for settlement through the court, it is the duty of the court to reduce the onerous obligation. Before the court makes any decision in reducing the onerous obligation, the court may ask the contracting parties to renegotiate the contract between themselves.[62] According to al-Sanhūrī, the obligation is subject to adjustment within reasonable limits. In

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[61] Refer to page 75 for the full text of the *ḥadīth*.

[62] Amkhan, "Change in Circumstances in Arab Contract Law", *Arab Law Quarterly*, vol. 9 (1994), pp. 258-275.

this respect, the judge may (1) suspend the performance of the contract, (2) reduce the onerous obligation and/or (3) increase the counter obligation.[63]

2.7.1 Suspension of the performance of the contract

The jurists suggest that the court may suspend the performance of the contract if a *ḥāditha ṭāri'a* is proven and the court believes that there is evidence that the event which has caused the onerous obligation is a temporary occurrence. Therefore, in a contract to build houses, if the price of the construction materials increases excessively due to unexpected circumstances, but the high price is predicted to come to an end, the court may suspend the performance of the contract until such the time as the price of the construction materials is back to normal.[64]

2.7.2 Reducing the onerous obligation

It is also suggested that the court is allowed to make an adjustment to the contract by reducing the onerous obligation to a reasonable limit. In this case, if a company is contracted to import a large sum of sugar, and suddenly the consumption of sugar drops due to unexpected circumstances, the court

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[63] al-Sanhūrī, *Maṣādir al-Ḥaqq*, vol. 6, p. 27.

[64] al-Sanhūrī, *Maṣādir al-Ḥaqq*, vol. 6, p. 27; al-Ṣadah, *op. cit.*, p. 488.

may reduce the amount of sugar to be imported to a reasonable limit that makes the obligation less onerous.[65]

2.7.3 Increasing the counter obligation

Increasing the counter obligation is seen by the jurists as another permissible step to be taken by the court in the event of *ḥawādith ṭāri'a*. Increasing the counter obligation works by maintaining the common or expected losses to the obligor. The common losses should not be distributed to the other party but he has to share the unexpected exorbitant losses equally with the debtor.[66]

It is important to note that, from an understanding of the *ḥadīth* of ᶜAmra, the Prophet does not directly determine the outcome of the contract. Therefore, it seems appropriate to conclude that the court has no power to terminate the contract. What a court can do within its jurisdiction is to ask the parties to the contract to renegotiate among themselves or, failing this, make some adjustment to the contract by taking into consideration the relevant circumstances and equivalence of benefits of both contracting parties.

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[65] al-Sanhūrī, *Maṣādir al-Ḥaqq*, vol. 6, p. 27; al-Ṣadah, *op. cit.*, p. 487

[66] al-Sanhūrī, *Maṣādir al-Ḥaqq*, vol. 6, p. 27; al-Ṣadah, *op. cit*, p. 487.

2.8 *Ḥawādith ṭāri'a* in modern legislation

The theory of *ḥawādith ṭāri'a* in its modern approach is recognised in most contemporary civil codes of the Arab world. Although it seems that the provisions in these codes are mainly a combination of French and Islamic law, it is important to point out that the origin of the current legal system can be traced back to the Ottoman civil code (*Majallat al-Aḥkām al-ᶜAdliyya*) in the nineteenth century.[67] This explains why the influence of the *Majalla* in the new civil codes is obvious especially in the area of contracts and obligations.[68]

Contemporary jurists are in agreement that the juridical basis of the inclusion of the theory of *ḥawādith ṭāri'a* in the new civil codes lies in the idea of justice and equitable considerations, and aims mainly at restoring the lost economic equilibrium of a valid contract, the continued performance of which would threaten one of the contracting parties with an overwhelming loss.[69] In the Egyptian Explanatory Memorandum of the Civil Code,[70] it unequivocally states that:

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[67] N.J. Brown, *The Rule of Law in the Arab World*, Cambridge, 1997, p. 11.

[68] Kourides, *op. cit.*, pp. 384-435.

[69] Amkhan, "Change in Circumstances in Arab Contract Law", *Arab Law Quarterly*, vol. 9, (1994), pp. 258-275.

> "the reason behind the adoption of this doctrine is to avoid exaggeration and rigidity in the interpretation of contracts; good faith, equitable considerations and the customary requirement of honesty in business transactions are factors which modify the binding effect of a contract and make it more just."[71]

The memorandum also states that the decisive factor in recommending that the theory be included in the new code is the concept of necessity in Islamic law and the Islamic legal principle that a lease may be annulled for a sufficiently good reason.[72] It is appropriate to note that, even though the explanatory memorandum admits that an important source of a provision on *ḥawādith ṭāri'a* in the civil code was adopted from the doctrine of *l'imprévision* in French administrative law and Article 269 of the Polish Civil Code, contemporary Muslim jurists believe that the concept is derived from the classical doctrines of *waḍ' al-jawā'iḥ* and *'udhr*.[73]

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[70] The new Egyptian Civil Code 1949 was prepared by the Egyptian Explanatory Memorandum of the Civil Code, led by Professor 'Abd al-Razzāq al-Sanhūrī, the eminent contemporary Egyptian jurist.

[71] *Egyptian Explanatory Memorandum of the Civil Code*, vol. 2, p. 370.

[72] Kourides, *op. cit.*, pp. 384-435.

[73] el-Malik, *op. cit.*, pp. 12-36; Kourides, *op. cit.*, pp. 384-435.

2.8.1 *Ḥawādith ṭāri'a* in the Egyptian Civil Code 1949

The 1949 Egyptian Civil Code was the first Arab legal system to adopt the theory of *ḥawādith ṭāri'a* with a modern approach. According to al-Sanhūrī:

> "The code was derived from twenty civil codes belonging to countries in Europe, Asia, Africa and the Americas, from the jurisprudence of the Egyptian courts, and from the *sharīᶜa*. Principles derived from the *sharīᶜa* related to the abuse of right, the responsibility of young persons of imperfect understanding, the transfer of debt and the principle of unforeseeable circumstances."[74]

The Egyptian Civil Code is chosen for detailed discussion for several reasons:

a) The past century of Egyptian legal history is very well documented in a wide variety of sources. Thus, a focus on Egypt allows for a more sophisticated and nuanced understanding of the relationship between the political and the legal systems.

b) The Egyptian case has been influential throughout the Arab world; Egypt is easily the most important Arab case.

c) Modern Egypt has experienced great variation in political systems, especially in those areas most relevant to explaining its legal

[74] Ziadeh, *op. cit.*, p. 14.

system.[75]

The most influential factor in choosing the Egyptian Civil Code is that the code formed the prototype which other Arab nations adopted with minor modifications. This factor is closely related to the fact that the civil codes for several Arab nations were drafted by al-Sanhūrī.[76]

In the Egyptian Civil Code, article 147(1) provides the general rule that the contract is the law of the parties, and they are bound by the contract. This is analogous to the meaning of a *ḥadīth* of the Prophet that "Muslims are bound by their contractual agreements" (*al-muslimūn ᶜalā shurūṭihim*). The Article says:

> "The contract makes the law of the parties. It can be revoked or altered only by mutual consent of the parties or for reasons provided for by law."[77]

As an exception to this general rule, a provision to revoke or alter the contract for reasons provided for by law states:

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[75] Brown, *op. cit.*, p. 16.

[76] For example, Paragraph 10 of the Explanatory Memorandum to the Iraqi Civil Code 1951 was drafted by al-Sanhūrī. See Amin, S.H., *Legal System of Iraq*, p. 101. The Syrian Civil Code 1949 was also drafted by al-Sanhūrī where the provisions closely followed the Egyptian Civil Code 1949. See Ziadeh, *op. cit.*, p. 11.

[77] Egyptian Civil Code 1949, Art. 147(1).

> "When, however, as a result of exceptional and unpredictable events of a general character, the performance of the contractual obligation, without becoming impossible, becomes excessively onerous in such a way as to threaten the debtor with exorbitant loss, the judge may, according to the circumstances, and after taking into consideration the interests of both parties, adjust to reasonable limits the obligation that has become excessive. Any agreement to the contrary is void."[78]

In the light of the above provision, " exceptional and unpredictable events of a general character" clearly refers to the theory of *ḥawādith ṭāri'a*. However, to invoke article 147(2) the following conditions must be fulfilled:

a) Exceptional circumstances of general character

According to Egyptian case law the term "exceptional and of general character" refers to events with a widespread effect which do not affect the contracting parties alone but must affect a wide range of people, such as earthquake, war, a sudden strike, government legislation or an epidemic.[79] The Egyptian Explanatory Memorandum of the Civil Code provides certain examples of "exceptional and of general character", such as a flood destroying different farms, or the spread of a disease, or an unexpected attack by a swarm

[78] Egyptian Civil Code 1949, Art. 147(2).

[79] el-Malik, *op. cit.*, pp. 12-36.

of locusts.[80] Accordingly, cases where the exceptional circumstances affect only the debtor, such as his bankruptcy, his death or the burning of his crops, may not be relied on to invoke article 147(2) of the code.[81]

b) The event being unpredictable and unforeseeable

The second element to invoke the article 147(2) is that the event in question must be unpredictable and unforeseeable at the time the contract was concluded. Therefore, the flooding of the Nile or the spreading of the cotton worm would not be considered "unpredictable or unforeseeable" since they are predictable.[82] The Egyptian Court of Cassation, for example, held that because of the continuation of World War II, the increase in the price of meat was to be expected and could have been foreseen by any reasonable person. The court therefore concluded that the increase could not be relied upon to support the claim of changed circumstances and consequently to invoke article 147(2) of the code.[83]

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[80] *The Preparatory Works of the Egyptian Civil Code*, vol. 2, p. 282 cited in Amkhan, "Change in Circumstances in Arab Contract Law", *Arab Law Quarterly*, vol. 9 (1994), pp. 258- 275.

[81] al-Sanhūrī, *Maṣādir al-Ḥaqq*, vol. 6, p. 26; al-Ṣadah, *op. cit.*, p. 484.

[82] al-Sanhūrī, *Maṣādir al-Ḥaqq*, vol. 6, p. 26., al-Ṣadah, *op. cit.*, p. 484.

[83] The Court of Cassation Judgement, no. 74, session 8/11/1951; cited in Amkhan, "Change in Circumstances in Arab Contract Law", *Arab Law Quarterly*, vol. 9 (1994), pp. 258-275.

c) Performance of the contract must be onerous

Article 147(2) requires that the performance of the obligations must be excessively onerous but not impossible. Onerous is defined by the Egyptian Court of Cassation as "a severe hardship inflicted on the obligor due to an exceptional event that threatens him with an exorbitant loss."[84] The article does not elaborate the amount of exorbitant loss, but Article 117(2) of the Sudanese Civil Act 1984 requires that one-third of the subject matter of contract to be damaged to invoke the doctrine of *ḥawādith ṭāri'a*.[85] The minimum amount of one-third as provided by the Sudanese Civil Act is clearly derived from a *ḥadīth* of the Prophet on *jā'iḥa*.[86] In contrast, "exorbitant loss" in the Egyptian civil code is not measured according to such a fixed figure but is left undefined. Thus, it may be appropriate to say that, under the code, judges are given more room to exercise discretionary power in determining the outcome of article 147(2).

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[84] el-Malik, *op. cit.*, pp.12-36.

[85] Sudanese Civil Act, Art. 117(2).

[86] The full text of the *ḥadīth* reads: Yaḥyā ibn Saʿīd reported that there are no deductions in the payment of something stricken with calamity for anything less than one third of the total value. See Abū Dawūd, *Sunan Abū Dawūd*, vol. 3, p. 376.

2.8.1 (a) The legal effect of *ḥawādith ṭāri'a* under Article 147(2)

Article 147(2) provides that, after all the requirements to invoke the principle of *ḥawādith ṭāri'a* are fulfilled, the judge may, according to the circumstances and after taking into consideration the interests of both parties, adjust the contractual obligation within reasonable limits. This article does not empower the judges to revoke the contract but merely to alter or modify the contract so that it gives benefit to both parties.[87]

It is to be noted that before the new Civil Code of 1949, the Mixed Courts of Egypt[88] had repeatedly rejected the doctrine of *ḥawādith ṭāri'a* and held that an obligation is not extinguished except by reason of *quwwa qāhira*. The courts held that as long as the performance was possible, the obligation had to be performed even if it was excessively onerous.[89] Under the new code, with the inclusion of article 147(2), the judge, according to the circumstances and after taking into consideration the interests of both parties, may only reduce to a reasonable limit an obligation that has become onerous. However, in practice, the attitude of the court in applying the provision in

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[87] al-Sanhūrī, *al-Wasīṭ fī Sharḥ al-Qānūn al-Madanī*, Cairo, n.d., vol. 1, p. 646.

[88] For further reading of the Mixed Courts of Egypt and other courts, see Brown, N.J., *The Rule of Law in the Arab World*, pp. 16-29.

[89] al-Sanhūrī, *al-Wasīṭ fī Sharḥ al-Qānūn al-Madanī*, vol. 1, pp. 636-638; cited in Kourides, *op. cit.*, pp. 384-435.

Article 147(2) can be judged from a statement by Egyptian Court of Cassation as follows:

> "...Article 147(2) of the Civil Code implies that when the requirements of the doctrine of unexpected circumstances are present, the judge may modify the contract within reasonable limits. In exercising this authority he cannot relieve the obligor of the entire loss inflicted upon him. He will require the obligor to bear the normal and expected losses, and the rest (i.e. the exorbitant part) will be divided equally between the contracting parties. Such a decision is to be considered just."[90]

It is appropriate to say that the approach taken by the Egyptian Court on Article 147(2) is to increase the counter obligation which is one of the solutions that can be chosen by the court. Mathematically, such a solution works as follows:

> "A trader enters into a contract to supply a large amount of flour with a cost of £300 per ton. Suddenly, due to unexpected circumstances, the cost increases to £900 per ton. Assume that expected losses are £100 per ton. In this case, the trader will bear the normal and expected losses. The remaining £500 is counted as unexpected losses to be divided equally between the contracting parties."[91]

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[90] Amkhan, "Change in Circumstances in Arab Contract Law", *Arab Law Quarterly*, vol. 9 (1994), pp. 258-275.

[91] al-Ṣadah, *op. cit.*, p. 487.

From the point of view of classical *fiqh*, Article 147(2) evidently does not reflect the Ḥanafīs doctrine of *ᶜudhr* (excuse),[92] even though al-Sanhūrī points out that Muslim jurists recognised the doctrine of unexpected circumstances with regard to leasing and even though he claims that he used the doctrine of *ᶜudhr* and *jawā'iḥ* as guidelines to draft the 'changed circumstances' clause in the new Egyptian Civil Code. However, it is doubtful that Article 147(2) is fully adopted from the doctrine of *ᶜudhr*, since there is a solution given in the doctrine which is not provided for by the article.[93]

2.8.2 *Ḥawādith ṭāri'a* in the Iraqi Civil Code 1951

The Iraqi legal system has a very long and outstanding history behind it. Its legal system can be traced back to long before the Islamic era and it became a leading centre of Islamic jurisprudence under the ᶜAbbasid caliphate (750-1258 AD). Even though Islamic law is the origin of its legal

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[92] In the Ḥanafī school, the legal effect of *ᶜudhr* is the termination of the contract. In hypothetical cases, the Ḥanafī jurist states that the desire of a lessee to travel to find a new job is a sufficient ground for termination of contract or in a case of a man who suffers a toothache calls a dentist but suddenly the pain ceases, is sufficient to terminate the contract. See al-Kāsānī, *Badāiᶜ*, vol. 4, p.197. It is incorporated in the *Majalla* which says: "When a valid impediment has appeared which is an obstacle to the carrying out of the object of the contract, the leasing is terminated." See *Majalla*, Art. 443.

[93] According to the doctrine of *ᶜudhr*, a solution for unexpected event is a termination of contract, whereas the article only requires a judge to reduce to reasonable limits the obligation of the contract.

systems, modern Iraq has adopted the Ottoman and Egyptian legal systems which are partially influenced by French and other European laws.[94]

The Iraqi Civil Code 1951 which was drafted by al-Sanhūrī is evidently a blend of several legal systems as he states in paragraph 10 of the Explanatory Memorandum:

"The provisions of this code were taken from :

a) the Egyptian code which, on the whole, is a selection of rules established in the most advanced Western legal systems,

b) from existing Iraqi legislation - foremost of which is the *Majalla* and the land law (of the Ottoman era), and

c) from the Islamic *Sharīᶜa*. The vast majority of these provisions were deduced from the various schools of Islamic jurisprudence without being restricted to any one specific school."[95]

Provision on *ḥawādith ṭāri'a* is modelled on the Egyptian Civil Code of 1949. Article 146(2) of the Iraqi Civil Code provides:

> "...however, where, as a result of exceptional and unpredictable events of a general character, the performance of the contractual

[94] S.H. Amin, *Legal System of Iraq*, Glasgow, 1985, pp. 108-109.

[95] Amin, *Legal System of Iraq*, pp. 101.

obligation, without becoming impossible, becomes excessively onerous in such a way as to threaten the debtor with exorbitant loss, the court may, after taking into consideration the interests of both parties, reduce the onerous obligation to a reasonable limit, if justice so requires."[96]

Article 146(2) of the Iraqi Civil Code, in the same way as Article 147(2) of the Egyptian Civil Code, requires three conditions in order for a plea for unexpected circumstances to be invoked under the article. Firstly, the event must be exceptional and of general character, secondly, the event must be unforeseeable and thirdly, the performance must have become excessively onerous. However, the two articles differ in three aspects:

a) Article 146(2) replaces the word "adjust" with "reduce".

b) Article 146(2) omits the phrase "according to the circumstances".

c) Article 146(2) inserts the phrase "if justice so requires" after the phrase "...to a reasonable limit".

2.8.2 (a) The legal effect of *ḥawādith ṭāri'a* under Article 146(2)

In the light of Article 146(2), there is one legal matter which concerns the jurists regarding its application. According to them, the application of the article must be taken as an exception to Article 146(1) of the code which

[96] Iraqi Civil Code 1951, Art. 146(2).

emphasises the general principle of the sanctity of contract. Therefore, as an exception, Article 146(1) is to be applied strictly as it is meant to be. The drafting Committee of the Law has suggested that Article 146(2) embodies a notion dangerous to the fundamental principle of the sanctity of contract.[97] Therefore, in its application, the court has a duty to be careful in interpreting an event as a *ḥāditha ṭāri'a* before making any decision therefrom.

Article 146(2) of the Iraqi Civil Code is definitely more clear, compared to Article 147(2) of the Egyptian Civil Code, in its provision regarding a decision that can be taken by the court after all the requirements for invoking the article are fulfilled. By using the word "reduce" (*...jāza li-l-maḥkama...an tanquṣa...*) rather than "adjust" (*...an yarudda...*), literally, the courts in Iraq should have no other option but to reduce the obligation if the debtor successfully invokes the article. On the contrary, the word "adjust" can be interpreted in many ways. As we have seen, the courts in Egypt may either reduce or suspend the obligation or increase the counter obligation if the debtor successfully proves the event of a *ḥāditha ṭāri'a*. In practice, however, the difference in wording is a matter of form rather than of

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[97] Coulson, *op. cit.*, p. 89.

substance. In general, reducing the onerous obligation by the courts in Iraq includes splitting the loss equally between the contracting parties.[98]

It is worth noting that, in its application, the Iraqi Civil Courts have accepted that losses of between 13% and 33% of the contract price are to be considered as "exorbitant."[99] It is safe to argue that the courts are influenced by the fundamental principle of losses in the *sharīᶜa* where the amount is fixed at one-third.[100]

The civil code of the Arab world keep changing according to time to provide a better law and achieve justice. From the Egyptian Civil Code, promulgated in 1948 and brought into force in 1949, through to the Kuwaiti Civil Code 1980, there has been a constant change in the provisions for *ḥawādith ṭāri'a*. As a comparison, the provision for *ḥawādith ṭāri'a* in the Kuwaiti Civil Code of 1980 deserves to be quoted in full:

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[98] See Salmān Bayat, *Iraqi Civil Jurisdiction*, Baghdad, 1962, p.165; cited by Coulson, *op. cit.*, p. 90.

[99] Coulson, *op. cit.*, p. 90.

[100] See, e.g., *Ḥadīth* reported by Yaḥyā ibn Saᶜīd which says that no deductions in the payment for something stricken with calamity for anything less than one-third. See also al-Zurqānī, *Sharḥ al-Zurqānī*, vol. 4, pp. 77-79., a *ḥadīth* on *waṣiyya* (will) from Saᶜd ibn Waqqāṣ when the Prophet commented that one-third is considered a big amount.

"If, after the conclusion of the contract and before it has been executed, the occurrence of exceptional and general events which were unforeseen when the contract was concluded make the performance of the contractual obligation, though not impossible, onerous on the obligor with the result of threatening him with exorbitant loss, the judge may, after considering the interest of both parties, modify the onerous obligation to a reasonable limit, by either reducing the onerous obligation or increasing the counter obligation. Any agreement to the contrary is null and void."[101]

[101] Kuwaiti Civil Code 1980, Art. 198.

SECTION II : THE THEORY OF *QUWWA QĀHIRA*

2.9 Preliminary concepts of *quwwa qāhira*

A contract may be prematurely terminated due to the supervening impossibility of performance resulting from an act of man or circumstances beyond his control which are through no fault of his own, such as earthquake, flood, freak storm and the like. The impossibility of performance may be either absolute (*muṭlaqa*) or relative (*nisbiyya*). Absolute impossibility means that it is impossible for any one at all to perform the obligation, while relative impossibility means that it is impossible for one particular person to perform the obligation, but it might be performed by another.[102] Absolute impossibility of performance is known in contemporary Muslim legal circles as *quwwa qāhira*. It is also known as an 'act of God'[103] (*al-ḥādith al-Ilāhī*) or 'misfortune from Heaven' (*āfa samāwiya*).[104]

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[102] al-Sanhūrī, *Maṣādir al-Ḥaqq*, vol. 4, pp. 128-129; Walton, *op. cit.*, vol. 2, p. 290.

[103] This is an act occasioned exclusively by the violence of nature without the interference of any human agency. It means a natural necessity proceeding from physical causes alone without the intervention of man. It is an act, event, happening, or occurrence, due to natural causes and inevitable accident, or disaster; a natural and inevitable necessity which implies entire exclusion of all human agency which operates without interference or aid from man and which results from natural causes and is in no sense attributable to human agency.

[104] Maḥmaṣṣānī, *al-Naẓariyya al-ᶜĀmma*, vol. 2, p. 497.

The term *quwwa qāhira* is not known in the early manuals of *fiqh*. However, there is a general rule in the *sharīᶜa* that damage (*ḍarar*) must be removed, which is derived from a *ḥadīth* of the Prophet which reads: "Damage and retaliation by damage is not allowed" (*lā ḍarar wa lā ḍirār*).[105] Therefore, in the light of this *ḥadīth* of the Prophet, the theory of necessity (*ḍarūra*) was founded in Islamic jurisprudence, which corresponds to the universal concept of necessity. The French jurist Lambert asserted, at the International Conference on Comparative Law in the Hague in 1932, that:

> "the theory of necessity was an undoubted and comprehensive expression of a concept found in basic form in public international law as the theory of variable circumstances; in the French administrative jurisdiction as the theory of unforeseen circumstances; in the English jurisdiction in the introduction of flexibility into the theory of impossibility of performance of the obligation under pressure of economic circumstances resulting from war; and in the American constitutional jurisdiction in the theory of sudden events."[106]

Even though the theory of *quwwa qāhira* is relatively new to the *fiqh* of Islām, and remarkably similar to the equivalent institutions to be found in some modern civil legal systems such as *force majeure* and *cas fortuit* in French law and the Western concept of Frustration, it has a valid foundation

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[105] Mālik, *al-Muwaṭṭā'*, p. 479.

[106] ᶜAbd Riḍā, ᶜAbd Rasūl., "The Principle of Pacta Sunt Servanda And Liability For Hidden Defects", *Arab Comparative & Commercial Law*, vol.1 (1987), pp. 61-66.

and strong roots in the classical manuals of *fiqh*. Similar to the doctrine of *ḥawādith ṭāri'a,* the doctrine of *quwwa qāhira* was founded from various classical concepts of *fiqh* such as *waḍ^{c} al-jawā'iḥ*, *^{c}udhr*, and selling fruit before its ripeness is evident.[107]

2.10 Definition of *quwwa qāhira*

Quwwa qāhira is defined as a fortuitous event which could not have been foreseen, which is impossible to resist and as a result of which performance of the contractual obligation becomes impossible, through no fault of the obligor.[108] There are at least three requirements needed in order to consider an event as *quwwa qāhira*: that it is unexpected, that it is unavoidable and that it is impossible to resist. Thus, if a supervening circumstance occurs after the completion of the contract which renders its performance impossible, the obligor may plead exemption from liability for non-performance by law.[109]

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[107] See Saleh, *op. cit.*, 1047-1051.

[108] al-Zuḥaylī, *Naẓariyyat al-Ḍarūra al-Shar^{c}iyya*, p. 330; A. Sultan, *Maṣādir al-Iltizām fī -l-Qānūn al-Madanī al-Urdunī*, Beirut, 1974, p. 227; al-Sanhūrī, *Maṣādir al-Ḥaqq*, vol. 6, p. 128.

[109] al-Zuḥaylī, *Naẓariyyat al-Ḍarūra al-Shar^{c}iyya*, p. 330; Rayner, *op. cit.*, p. 260.

Apart from *quwwa qāhira*, the jurists also recognise *al-ḥādith al-fujā'ī* (*cas fortuit*) as an unforeseen event caused by a superior force which it is impossible to resist. It is interesting to note that, while some jurists held that *quwwa qāhira* and *al-ḥādith al-fujā'i* are two different concepts, others are of the opinion that these are one single matter. Some jurists insist, as a matter of correct language, that the term *al-ḥādith al-fujā'i* is more appropriate for denoting the action of natural forces, such as fire and flood, while *quwwa qāhira* is more properly applied to an act of man which creates an insurmountable obstacle to the performance.[110] In this regard, al-Sanhūrī summarises the opinions of the jurists as follows:

a) *Quwwa qāhira* is an event which it is impossible to resist, while *al-ḥādith al-fujā'i* is an event which occurs fortuitously. It is sufficient to consider an event as *quwwa qāhira* if the event is impossible to resist and to consider an event as *ḥādith fujā'i* if the event is unable to be predicted.

b) Both *quwwa qāhira* and *al-ḥādith al-fujā'i* have to fulfil these two requirements. However, to be considered *quwwa qāhira*, the event must be absolutely impossible (*istiḥāla muṭlaqa*) to resist, whereas in *al-ḥādith al-fujā'i*, the event is only comparatively impossible (*istiḥāla nisbiyya*) to resist.

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[110] Walton, *op. cit.*, p. 290.

c) Both *quwwa qāhira* and *al-ḥādith al-fujā'i* are fortuitous events which are impossible to resist but they differ in the sense that *quwwa qāhira* is caused by an external event such as an earthquake, a freak storm and the like, whereas *al-ḥādith al-fujā'i* is an internal event that occurs within the subject such as a tyre blow out, a machine breakdown and the like. Consequently, in *quwwa qāhira* the parties are released from their obligations, whereas in *al-ḥādith al-fujā'i* they are not.[111]

Al-Sanhūrī, in his observations on the opinions of the jurists, has commented that the first opinion is not accurate. He asserts that in order to be considered *quwwa qāhira* and *al-ḥādith al-fujā'i*, an event must be fortuitous and impossible to resist. According to him, it is not sufficient to fulfil only one of the requirements to be considered either *quwwa qāhira* or *al-ḥādith al-fujā'i* because these two conditions complement each other.[112]

On the second opinion, his view is that the differentiation is made on the wrong basis because the impossibility of resistance in both *quwwa qāhira* and *al-ḥādith al-fujā'i* must be absolute. For the third opinion, he says that the opinion should be rejected as well because it is known that there is no

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[111] al-Sanhūrī, *Maṣādir al-Ḥaqq*, vol. 6, pp. 128-129. See also, ᶜAid. Idwār, *al-ᶜUqūd al-Tijāriyya wa ᶜAmaliyyat al-Maṣārif*, Beirut, 1968, pp. 347-351.

[112] al-Sanhūrī, *Maṣādir al-Ḥaqq*, vol. 6, p. 128.

difference in the consequences of the event as far as the obligation is concerned. In this regard, obligation becomes impossible.[113]

2.11 Judicial basis of *quwwa qāhira*

Even though *quwwa qāhira* and *ḥawādith ṭāri'a* are two different concepts, it is appropriate to say that these two concepts share similarities in terms of the judicial basis behind their legislation. In brief, the judicial basis underlying the doctrine of *quwwa qāhira* in Islam is a requisite balance between the rights and obligations of the contracting parties which motivates the doctrine of *istighlāl*[114] and unjustified enrichment (*al-ithrā' bilā sabab*).[115] This is due to the fact that in the event of *quwwa qāhira*, one party in the contract will exploit the circumstances while the other party will be a victim of the exploitation. It should also be observed that the general concepts of *istiḥsān* and *maṣāliḥ mursala* are always to be taken into consideration as part of the basis of the doctrine. Furthermore, the fundamental principle of justice in Islam is the most important element behind the legislation of the doctrine.

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[113] al-Sanhūrī, *Maṣādir al-Ḥaqq*, vol. 6, p. 129.

[114] *Istighlāl* means unfair exploitation. It is based on the principle of *Lā ḍarar wa lā ḍirār* (Damage cannot be put to an end by its like) and *al-Ḍarar yuzāl* (Damage is to be put to an end).

[115] Rayner, *op. cit.*, p. 261.

2.12 The constituent elements of *quwwa qāhira*

Quwwa qāhira or *al-ḥādith al-fujā'i* is an event which is not the fault of the obligor or is non-imputable to him, such as the outbreak of a war, an earthquake, a violent storm, a riot, a disease and the like. It is also includes sickness and the conduct of a ruler which prevents the performance of an obligation.[116] To further illustrate this, ordinary climatic conditions such as may be expected to occur will not as a general rule be regarded as *quwwa qāhira*. It is true that the event cannot be prevented, but it can be foreseen and provided against. The parties when they make their contract must have these circumstances in mind. For example, frost in Egypt of fifty degrees below zero C°, if it prevented the performance of a contract, would undoubtedly be *quwwa qāhira*, whereas in certain parts of Canada it would be an event to be expected at some seasons.[117] Therefore, in order to constitute an event as *quwwa qāhira* it must satisfy three conditions: it must be unforeseeable, unavoidable and impossible to resist.

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[116]Sulṭān, *op. cit.*, p. 339.

[117] Walton, *op. cit.*, p. 298.

2.12.1 The event must be unforeseeable

In order to consider an event as *quwwa qāhira*, it must be an unexpected event at the time of the conclusion of the contract. In a case where the event might have been anticipated, even though it is impossible to avoid, the party cannot plea for an excuse on the ground of *quwwa qāhira*.[118] An event may be unexpected in one of two ways; it may never have occurred before, or it may have occurred before but is not expected to happen again.[119] The debtor is allowed to plea for non-performance if the unexpected event occurs at the conclusion of the contract or after its conclusion but before the execution of the contract.

2.12.2 The event must be unavoidable

The second element in considering an event as *quwwa qāhira* is that it must be unavoidable. That is to say that it must not have been possible for any party to the contract to avoid the occurrence of the event even though all necessary steps have been taken to stop the occurrence of the event. In this regard, the unavoidable event is not only related to the party of the contract

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[118] al-Sanhūrī, *Maṣādir al-Ḥaqq*, vol. 6, p. 129; Amkhan, "*Force Majeure and Impossibility of Performance*", Arab Law Quarterly, vol. 6 (1991), pp. 297-308.

[119] Sulṭān, *op. cit.*, p. 339.

but also to a reasonable person who might have been in the same position as the contracting party.[120]

2.12.3 The event must be impossible to resist

The event must be absolutely impossible to resist. In a case where the event can be resisted even though it is unexpected, it cannot be considered as *quwwa qāhira*. A debtor also cannot liberate himself on the grounds of *quwwa qāhira* unless there is an absolute impossibility of the execution of the obligation. It is not enough that in consequence of the unexpected event the execution has just become more difficult. Absolute impossibility is also defined so that the onerous performance is not only confined to the debtor but is of a general character which would extend to anyone in his position.[121]

It is worth noting that apart from the three conditions above, for the debtor to liberate himself from obligation, the unexpected event must be the sole cause of the non-performance. The event directly affects the debtor and

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[120]al-Sanhūrī, *Maṣādir al-Ḥaqq*, vol. 6, p. 129; al-Zuḥaylī, *Naẓariyyat al-Ḍarūra al-Sharᶜiyya*, p. 330; Amkhan, "Force Majeure and Impossibility of Performance", *Arab Law Quarterly*, vol. 6 (1991), pp. 297-308.

[121] al-Sanhūrī, *Maṣādir al-Ḥaqq*, vol. 6, pp. 129-130; Sultan, *op. cit.*, p. 339.

prevents him from performing his contract. Thus, if the event is caused by the debtor himself, he cannot plea for non-performance.[122]

2.14 *Quwwa qāhira* and *ḥawādith ṭāri'a* compared

Even though the concept of *quwwa qāhira* shares certain features with the concept of *ḥawādith ṭāri'a*, they differ in certain other features. A distinction can be seen in the constituent elements of the concepts as follows:

a) In order to invoke the doctrine of *ḥawādith ṭāri'a*, the event must be exceptional and of a general character, and have a widespread effect beyond its effect on the contracting party, whereas an exceptional event in the doctrine of *quwwa qāhira* can be particular in nature. It is sufficient that the event affects the contracting party alone to invoke the doctrine of *quwwa qāhira*.

b) As far as the contractual obligation as concerned, in *ḥawādith ṭāri'a* the contractual obligation must have become excessively onerous, whereas *quwwa qāhira* makes the performance of the contractual obligation impossible.

c) In *ḥawādith ṭāri'a*, after all the requirements to invoke the doctrine are fulfilled, the court may only adjust the onerous contractual obligation within

[122] Sulṭān, *op. cit.*, p. 339.

reasonable limits, whereas *quwwa qāhira*, if proven, will terminate or suspend the contract.[123]

Conclusion

This chapter has provided a discussion on the theory of *ḥawādith ṭāri'a* from the perspective of the *sharīᶜa* with a brief background to the theory since its inception in the medieval era until modern times. This chapter also has provided a brief discussion on *quwwa qāhira* in comparison with *ḥawādith ṭāri'a*. It is correct to conclude that *ḥawādith ṭāri'a* and *quwwa qāhira* in early *fiqh* are not a general theory for solving unforeseen circumstances. In fact, the terms do not exist in any works of early Muslim jurists. The existence of the doctrines as they have been defined in many civil codes today is an effort by contemporary Muslim jurists to reconstruct and extend beyond the classical works of *fiqh* for modern application. In their new form, it is obvious that the theories have been heavily influenced by Western civil codes, although the *sharīᶜa* stands as their fundamental pillar.

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[123] See al-Sanhūrī, *Maṣādir al-Ḥaqq*, vol. 6, p. 26; See also, al-Zuḥaylī, *Naẓariyyat al-Ḍarūra al-Sharᶜiyya*, pp. 332-333; Sulṭān, *al-Naẓariyya al-Āmma li -l-Iltizām*, p.449; Amkhan, "Force Majeure and Impossibility of Performance in Arab Contract Law," *Arab Law Quarterly*, 6 (1991), pp. 297-308.

It is appropriate to note that an idea equivalent to the theories of *ḥawādith ṭāri'a* and *quwwa qāhira* can be found in the early works of Muslim jurists in the general notion of "*āfa samāwiyya*" and "'*amr min Allāh*". The theories of *ḥawādith ṭāri'a* and *quwwa qāhira* in the *sharī*^{c}*a* then, are primarily developed in several doctrines which are scattered in the classical manuals of *fiqh*. The concept is found either in the basic rules of certain doctrines or in hypothetical cases which illustrate a general application of the theories. In addition, *ḥadīths* of the Prophet can be considered as a precedent for the theories, together with several legal maxims which provide a guide line for the legislation of the theories in their modern form.

PART TWO

THE CLASSICAL HERITAGE

CHAPTER III

ḤAWĀDITH ṬĀRI'A IN THE QUR'ĀN AND THE *SUNNA*

3.0 Introduction

As indicated earlier, the theory of *ḥawādith ṭāri'a* has not been treated extensively in the classical manuals of *sharī^{c}a*. The fact that the term does not exist in the Qur'ān explains why the theory seems to have been ignored by early jurists. However, despite the fact that the theory of *ḥawādith ṭāri'a* does not exist in the Qur'ān explicitly, this does not mean that the *sharī^{c}a* has ignored the substance of the theory . In fact, the subject of the theory is treated implicitly by the early jurists through the various concepts of Islamic jurisprudence. Al-Shāfi^{c}ī mentions in his book the *Risāla,* that the injunctions in the Qur'ān consist of the following three categories:

1. What the Book has laid down with such clarity that nothing further- in addition to revelation (*tanzīl)* - is needed.
2. What is clearly stated in the obligation imposed [by God] ordering obedience to the Prophet. The Prophet in his turn precisely stated on the authority of God what the various duties are, upon whom they are binding, and

in what circumstances some of them are required or not required, and when they are binding.

3. What [God] has specified only in the sunna of His Prophet, in the absence of textual [legislation in the] Book.[1]

Following al-Shāfiᶜī's observation, we can say that the authority for the legality of the theory of *ḥawādith ṭāri'a* can be ascribed to the three categories classified by al-Shāfiᶜī. It can be found indirectly in the Qur'ān through general concepts of justice and equity in Islam or through various concepts in Islamic jurisprudence.

3.1 The concept of justice in commercial transactions

A main concern which forms a legal basis for the theory of *ḥawādith ṭāri'a* is unexpected events which involve the contracting parties in commercial transaction. One of the parties might suffer a great loss from the events that is beyond his control. We shall therefore examine the relevant provisions in the Qur'ān about contracts and sales together with the Qur'ānic injunctions on the concept of *ᶜadl* (justice) and prohibitions on the act of *ẓulm* (injustice) which are also relevant to our discussion.

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[1] al-Shāfi'ī, *Al-Risāla fī uṣūl al-fiqh,* [translated with an introduction, notes and appendices by Majid Khadduri as Treatise on the Foundations of Islamic Jurisprudence], Cambridge: Islamic Texts Society, 1987. p. 76.

Ibn Ḥazm, for instance, notes that achieving justice (*ᶜadl*) is the main purpose behind contracts (*ᶜuqūd*). That is also the reason why God sent the Prophet with the revelation of the Qur'ān. He quotes a verse in the Qur'ān in order to support his view:

> "We sent aforetime Our Prophet with clear signs and sent down with them the Book and the Balance (of right and wrong), that men may stand forth in justice."[2]

Ibn Ḥazm said that the *sharīᶜa* prohibits usury and gambling because of the element of injustice in usury and gambling and consuming others' property without right. The Messenger of God forbade these two types of transactions as he forbade another type of transactions such as sales which involves any element of uncertainty or risk (*bayᶜ al-gharar*), sales of fruit before its ripeness is evident, *bayᶜ ḥabal al-ḥabala, bayᶜ al-muzābana* and *muḥāqala* and the like. All these types of transactions have the elements of usury and gambling.[3] His view is shared by al-Qurṭubī who says in his *tafsīr* on the same verse that the revelation in all the scriptures aims to promote justice among people in their transactions.[4]

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[2] Q., *al-Ḥadīd* (57): 25

[3] Ibn Qayyim, *Iᶜlām al-Muwaqqiᶜ īn ᶜan Rabb al-ᶜĀlamīn,* vol. 1, Beirut, 1970, pp. 292-293.

[4] Al-Qurṭubī, *al-Jāmiᶜ li Aḥkām al-Qur'ān,* vol. 17, Cairo, 1948, p. 260.

In another verse it says: "O you who believe, consume not up your property among yourself without right, but let there be amongst you traffic and trade by mutual good will."[5] Ibn Kathīr in his *tafsīr* says that Allāh has prohibited the Muslims from consuming each other's property wrongfully. This includes taking others' property in a way that contravenes the *sharī'a*, such as usury, compulsion, and the like.[6] In another verse it says: "God commands you to hand back your trusts to their rightful owners and whenever you judge among men, to pass your judgement with justice."[7]

3.2 Islamic jurisprudence on *ḥawādith ṭāri'a*

Islamic law is divine in its original sources and principles. The Qur'ān is the first source of Islamic jurisprudence, followed by the *sunna* of the Prophet. In the light of the Qur'ān and the *sunna* of the Prophet, Muslim jurists, since the death of the Prophet, have devoted their time to regulating the law in order to meet the need of ever changing circumstances. The *sunna* of the Prophet is considered as supplementary to, and explanatory of, the Qur'ān. From these two unanimously accepted sources, another two are

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[5] Q., *al-Nisā'* (4): 29.

[6] Ibn Kathīr, *Tafsīr al-Qur'ān al-'Azīm,* vol. I, p. 479.

[7] Q., *al-Nisā'* (4): 58.

derived: consensus (*ijmāᶜ*) and analogy (*qiyās*). In addition to these four sources, there are other sources such as *istiḥsān* (preference) in the Ḥanafī school, *maṣāliḥ mursala* (public interest) in the Māliki school and *istiṣḥāb* (presumption of continuity) in the Shāfiᶜī school. Furthermore, they have regulated a general rule which applies in all circumstances and which take the form of legal maxims (*qawāᶜid fiqhiyya*).

The main concern in *ḥawādith ṭāri'a* is when there is a difficulty of performing an obligation in a contract of sales or other nominate contract resulting from a change of circumstances. Even though there are no legal maxims which specially regulate *ḥawādith ṭāri'a*, a number of guidelines have been stipulated which strongly assist the application of these maxims to *ḥawādith ṭāri'a*. The application of the maxims comes in two ways: through the general principle of Islamic jurisprudence and through the provision of specific laws.

3.3 General principles of Islamic jurisprudence

Ḥanbalī scholar, Ibn Qayyim al-Jawziyya has said that the foundation of the *sharīᶜa* is wisdom, the safeguarding of people's interest and the promotion

of justice and mercy among them.[8] In this respect, it is necessary in certain circumstances that the scope of the rules is enlarged to cater for the changing times and the needs of the people, within the guidelines of the Qurān and *sunna*. Difficulty and hardship in the event of changed circumstances and the need for promoting justice and safeguarding people's interest have prompted the jurists to arrive at rulings regarding necessity and need.

3.3.1 Ruling on necessity and need

Rules are general in nature. In certain circumstances, their application brings hardship and difficulty to people, with the result that meticulous adherence to the law turns into injury and injustice.[9] According to al-Ghazālī, everything that exceeds its limit changes into its opposite.[10] Thus it becomes necessary to lighten the peoples' burden and to disregard general rules in certain exceptional circumstances if their application will result in injury and hardship.[11] These concepts are supported by the Qur'ān in several verses to this effect, e.g. "He has chosen you, and has imposed no difficulties on you in

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[8] Ibn Qayyim, *I'lām al-Mu'aqqi'īn*, vol. 3, p. 1.

[9] Maḥmaṣṣānī, *Falsafat al-Tashrī' fī-l-Islām*, [English Translation by Farhat J. Ziadeh], p. 152.

[10] Al-Suyūṭī, *al-Ashbāh wa -l-Naẓā'ir,* Cairo, 1378H/1959M, p. 59.

[11] Maḥmaṣṣānī, *Falsafat al-Tashrī' fī -l-Islām*, [English translation by Farhat J. Ziadeh "The Philosophy of Jurispridence in Islam"], Kuala Limpur: Hizbi Publication, pp. 152-153.

religion..."[12] Another verse reads: "But if one is forced by necessity, without willful disobedience,- then God is Oft-Forgiving, Most Merciful."[13]

Although these verses refer to specific matters of the *sharī'a*, the recognition of the *sharī'a* of unexpected events in the form of a stipulation for lightening the burden of people in the theory of *ḥawādith ṭāri'a* could be derived through the concept of *qiyās* (analogy).

On this point, the jurists have established several maxims, as follows:

1. Hardship begets facility;[14] that is to say, in difficult situation a facility is given by law.
2. Where a matter is narrow it becomes wide.[15]
3. Injury must be removed.[16]
4. Injury cannot be put an end to by its like.[17]
5. Injury is repelled as far as possible.[18]

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[12] Q., *al-Ḥajj* (22): 78.

[13] Q., *al-Naḥl* (16): 115.

[14] *Majallat al-Aḥkām*, Art. 17. See also above, p. 69.

[15] *Majallat al-Aḥkām*, Art. 18.

[16] *Majallat al-Aḥkām*, Art. 20. See also above, p. 70.

[17] *Majallat al-Aḥkām*, Art. 25. See also above, p.70.

[18] *Majallat al-Aḥkām*, Art. 31. See also above, p. 70.

3.4 *Ḥawādith ṭāri'a* in the *sunna*

The *sunna* of the Prophet provides a strong foundation for the basic legislation of the theory of *ḥawādith ṭāri'a.* In spite of the fact that the term *ḥawādith ṭāri'a* does not appear explicitly in the sunna, this does not mean that the *sharīᶜa* is silent on the events constituting *ḥawādith ṭāri'a.* Indeed, the Prophet laid down a foundation for the theory in his *sunna*, and it can also be derived from various *ḥadīths* of the Prophet as reported in the *ḥadīth* collections. The most significant authority for the theory is found in *ḥadīths* pertaining to *waḍᶜ al-jawā'ih* (calamities) and *bayᶜ al-thimār qabla an yabduwa ṣalāḥuhā* (the sale of fruit before its ripeness is evident).

For the purpose of this research, eight books from various *ḥadīth* collections have been examined, namely, the *Muwaṭṭā'* of Mālik, *Ṣaḥīḥ al-Bukhārī, Ṣaḥīḥ Muslim, Sunan Abī Dāwūd, Sunan al-Tirmidhī, Sunan al-Nasā'ī, Sunan Ibn Mājah* and the *Musnad* of Aḥmad ibn Ḥanbal. In the *Muwaṭṭā' al-Imām Mālik,* the *ḥadīths* on *jā'iḥa* and *bayᶜ al-thimār qabla an yabduwa ṣalāḥuhā* are placed in the 'Book of Sales' (*kitāb al-buyūᶜ*)[19]. Al-ᶜAsqalānī in *Fatḥ al-Bārī bi Sharḥ Ṣaḥīḥ al-Bukhārī* has placed the *ḥadīths* on both matters in the 'Book of Sales' (*bāb al-bayᶜ*)[20]. In

[19] al-Suyūṭī, *Muwaṭṭā' al-Imām Malīk wa Sharḥuhu Tanwīr al-Ḥawālik*, vol. 2, pp. 51-52.

[20] al-ᶜAsqalānī, *Fatḥ al-Bārī bi Sharḥ Ṣaḥīḥ al-Bukhārī*, vol. 4, pp. 313-316.

Ṣaḥīḥ Muslim bi Sharḥ al-Nawawī, *waḍ^{c} al-jawā'iḥ* is placed in the 'Book of Irrigation and plantation' (*kitāb al-musāqāt wa -l-muzāra^{c}a*),[21] whereas the matter of *bay^{c} al-thimār qabla an yabduwa ṣalāḥuhā* is placed in the 'Book of Sales' (*kitāb al-buyū^{c}*).[22] Abū Dāwūd has placed both *waḍ^{c} al-jawā'iḥ* and *bay^{c} al-thimār qabla an yabduwa ṣalāḥuhā* in the 'Book of Sales' (*kitāb al-buyū^{c}*).[23] In *Sunan al-Tirmidhī*, there are *ḥadīths* on *bay^{c} al-thimār qabla an yabduwa ṣalāḥuhā* only. They are placed in the 'Books of Sales' (*abwāb al-buyū^{c}*).[24] There is no *ḥadīth* regarding the *waḍ^{c} al-jawā'iḥ* in the *Sunan al-Tirmidhī*. Al-Nasā'ī in his *Sunan* has placed both the *ḥadīths* on *bay^{c} al-thimār qabla an yabduwa ṣalāḥuhā* and *waḍ^{c} al-jawā'iḥ* in the 'Book of Plantation' (*kitāb al-muzāra^{c}a*)[25], while Ibn Mājah, in his *Sunan*, has placed the *ḥadīths* on both matters in the 'Book of Trade' (*kitāb al-tijārat*).[26] Like al-Tirmidhī, Aḥmad ibn Ḥanbal in his *Musnad* has not reported any *ḥadīth* regarding *waḍ^{c} al-jawā'iḥ*, but has documented nineteen *ḥadīths* under the

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[21] al-Nawawī, *Ṣaḥīḥ Muslim bi Sharḥ al-Nawawī*, vol. 10, pp. 216-219.

[22] *Ibid.*, pp. 192-196.

[23] Abū Dāwūd, *Sunan Abū Dāwūd*, vol. 3, pp. 344-355 and pp. 375-376.

[24] al-Tirmidhī, *Sunan al-Tirmidhī*, vol. 2, pp. 348-349.

[25] al-Suyūṭī, *Sunan al-Nasā'ī bi Sharḥ Jalal al-Dīn al-Suyūṭī*, vol. 7, pp. 262-265.

[26] Ibn Mājah, *Sunan Ibn Mājah*, vol. 2, pp. 746-747.

chapter of business transactions (*al-mu^{c}āmalāt*).[27] This material will be presented under three different headings: the text of the *ḥadīth*, the theme of the *ḥadīth* and the *isnād* (chain of narrator).

3.4.1 The *ḥadīths* on *ḥawādith ṭāri'a*

As indicated above, the *ḥadīths* regarding *ḥawādith ṭāri'a* are found in the chapters on *waḍ^{c} al-jawā'iḥ* and *bay^{c} al-thimār qabla an yabduwa ṣalāḥuhā*. The texts on both matters will be considered closely in the following discussion.

a) The *ḥadīths* on *waḍ^{c} al-jawā'iḥ*

The *ḥadīths* on *waḍ^{c} al-jawā'iḥ* are, in the main, the most important *ḥadīths* in providing the foundations of the theory of *ḥawādith ṭāri'a*. There are several *ḥadīths* which deal with this matter:

i) It is related from Mālik from Abū al-Rijāl Muḥammad ibn ^{c}Abd al-Raḥmān who heard his mother ^{c}Amra bint ^{c}Abd al-Raḥmān saying that a man bought the fruit of an enclosed orchard in the time of the Messenger of Allāh and he tended it while staying on the land. It became clear to him that there was

[27] Ibn Ḥanbal, *al-Musnad*, vol. 7, pp. 54, 80, 102, 107-108, 123-124, 125, 126, 138-139, 149, 150, 166, 180, 191, 196, 256-257, 269, 280, 295.

going to be some loss. He asked the owner of the orchard to reduce the price for him or to revoke the sale, but the owner made an oath not to do so. The mother of the buyer went to the Messenger of Allāh and told him about it. The Messenger of Allāh said, "By his oath he has sworn not to do good." The owner of the orchard heard about it and went to the Messenger of Allāh and said, "O Messenger of Allāh, the choice is his."[28]

ii) Ibn Jurayj said that Abū al-Zubayr told him that he heard Jābir say: The Prophet said, "If you were to sell fruit to your brother and it was then stricken by a calamity, it would not be permissible for you to take anything from him. Why do you take the wealth of your brother without justification?"[29]

iii) Ibn Jurayj narrated from Abū al-Zubayr al-Makkī from Jābir ibn ᶜAbd Allāh that the Prophet, "If someone sells fruits and these are stricken with calamity, he is not permitted to take anything from his brother."[30]

iv) Sulaymān ibn ᶜAtīq narrated from Jābir that the Prophet commanded that deductions be made in the payment of something stricken with a calamity.[31]

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[28] al-Suyūṭī, *Muwaṭṭā' al-Imām Mālik,* vol. 2, p. 52.

[29] al-Nawawī, *Ṣaḥīḥ Muslim bi Sharḥ al-Nawawī,* vol. 10, p. 216; al-Suyūṭī, *Sunan al-Nasā'ī,* vol. 7, p. 264; Abū Dāwūd, *Sunan Abū Dāwūd,* vol. 3, p. 376; Ibn Mājah, *Sunan Ibn Mājah,* vol. 2, p. 747.

[30] al-Suyūṭī, *Sunan al-Nasā'ī,* vol. 7, p. 265.

v) Ibn Jurayj narrates that ᶜAṭā' said: "A calamity (*jā'iḥa*) is very clear disaster caused by rain, cold, locusts, wind or fire."[32]

vi) Abū Saᶜīd al-Khudrī reported that in the time of the Prophet a man suffered loss in fruits he had bought and his debt increased. The Prophet told (the people) to give him charity and they gave him charity, but that was not enough to pay the debt in full, so the Prophet said to his creditor: "Take what you find; you have no right to anything else."[33]

vii) Yaḥyā ibn Saᶜīd reported that there are no deductions in the payment of something stricken with calamity for anything less than one third of the total value.[34]

viii) Ḥumayd al-`Aᶜraj narrated from Sulaymān ibn ᶜAtīq from Jābir ibn ᶜAbd Allāh that the Prophet forbade the selling of the produce of years ahead and

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[31] *Ibid.*, p. 265.

[32] Abū Dāwūd, *Sunan Abū Dāwūd*, vol. 3, p. 376.

[33] al-Nawawī, *op. cit.*, vol. 10, p. 218; Abū Dāwūd, *Sunan Abū Dāwūd*, vol. 3, p. 375; al-Suyūṭī, *Sunan al-Nasā'ī*, vol. 7, p. 265.

[34] Abū Dāwūd, *Sunan Abū Dāwūd*, vol. 3, p. 376.

commanded deductions to be made in the payment of something stricken with a calamity.[35]

b) The *ḥadīths* on *bayᶜ al-thimār qabla an yabduwa ṣalāḥuhā*

The *ḥadīths* pertaining to *ḥawādith ṭāri'a* are also found under the chapter of *bayᶜ al-thimār qabla an yabduwa ṣalāḥuhā* (the sale of fruit before its ripeness is clearly evident). There are many *ḥadīths* of the Prophet regarding this matter. *Ḥadīths* come in two ways: firstly, when fruits are referred to in general and secondly when the type of the fruit is stated in particular.

3.5 The *ḥadīths* on fruit in general

i) Zayd ibn Thābit narrated: "In the lifetime of the Messenger of Allāh people used to buy and sell fruit. When they cut their fruit (dates) and the purchasers came to receive their rights the sellers would say, 'My dates have got rotten; they are blighted with disease and afflicted with *quthām* [a disease which causes the fruit to fall before ripening].' They would go on complaining

[35] *Ibid.*, p. 345.

of defects in their purchases. Allāh's Messenger said, 'Do not sell fruit before its ripeness is evident,' by way of advice, for they quarrelled too much."[36]

ii) ᶜAbd Allāh ibn ᶜUmar narrated: "Allāh's Messenger forbade the selling of fruit until its ripeness was evident; he forbade it both to the seller and to the buyer."[37]

iii) Jābir ibn ᶜAbd Allāh narrated: "Allāh's Messenger forbade the sale of fruit until it had become ripe (*yaṭība*)."[38]

iv) Jābir ibn ᶜAbd Allāh narrated: "Allāh's Messenger forbade the sale of fruit until it had become mellow (*tushakkiḥu*). We said, 'What does the word mellow mean?' He said (that the fruit) turns red or yellow and is fit for eating."[39]

v) Anas ibn Mālik narrated "Allāh's Messenger forbade the sale of fruit till it was almost ripe (*tuzhiya*). He was asked what is meant by 'are almost ripe'.

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[36] al-ᶜAsqalānī, *Fatḥ al-Bārī bi Sharḥ Ṣaḥīḥ al-Bukhārī*, vol. 4, pp. 313-314; Abū Dāwūd, *Sunan Abī Dāwūd*, vol. 3, p. 345.

[37] al-ᶜAsqalānī, *ibid.*, p. 314; al-Nawawī, *op. cit.*, vol. 10, pp. 177-178; al-Shaybānī, *Muwaṭṭā' al-Imām Mālik*, p. 268; Abū Dāwūd, *Sunan Abī Dāwūd*, vol. 3, p. 344; Ibn Mājah, *Sunan Ibn Mājah*, vol. 2, p. 746; Aḥmad Ibn Ḥanbal, *op. cit.*, vol. 7, p. 196.

[38] al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, vol. 3, *ḥadīth* no. 394, al-Nawawī, *op. cit.*, vol. 10, p. 180.

[39] al-ᶜAsqalānī, *op. cit.*, vol. 4, p. 315.

He replied, 'When it becomes red.' Allāh's Messenger further said, 'If Allāh spoiled the fruit what right would one have to take the money of one's brother?'"[40]

vi) Abū al-Zinād narrated from Khārija ibn Zayd that Zayd ibn Thābit would not sell the fruit from his land till the Pleiades (*al-thurayyā*) appeared.[41]

vii) Muḥammad ibn ᶜAbd Allāh narrated from Ibn Abī Dhi'b that ᶜUthmān ibn ᶜAbd Allāh ibn Surāqa said, "I have asked Ibn ᶜUmar about selling fruit. He said, 'Allāh's Messenger forbade the sale of fruit till it was free from blight.' I asked, 'What is meant by "free from blight"?' He said, 'Till the Pleiades have appeared.'"[42]

viii) Abū al-Rijāl Muḥammad ibn ᶜAbd al-Raḥmān narrated that his mother ᶜAmrā said, "Allāh's Messenger forbade the sale of fruit till it was free from blight."[43]

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[40] al-Laythī, *al-Muwaṭṭā'*, p. 398; al-ᶜAsqalānī, *op. cit.*, vol. 4, p. 316; al-Nawawī, *op. cit.*, vol. 10, p. 217; al-Suyūṭī, *Sunan al-Nasā'ī*, vol. 7, p. 264.

[41] al-Laythī, *al-Muwaṭṭā'*, p. 399; al-Shaybānī, *Muwaṭṭā' al-Imam Mālik*, p. 268., al-ᶜAsqalānī, *op. cit.*, vol. 4, p. 314.

[42] Aḥmad ibn Ḥanbal, *op. cit.*, vol. 7, pp. 138-139.

[43] al-Shaybānī, *Muwaṭṭā' al-Imām Mālik*, p. 268.

ix) Ibn ᶜUmar narrated, "Allāh's Messenger has said, 'Do not buy fruits until their good condition becomes clear.'" In a *ḥadīth* transmitted on the authority of Shuᶜba it is stated that Ibn ᶜUmar was asked what good condition implied, and he said, 'When there is no longer any danger of blight .'"[44]

x) Abū Muᶜāwiya narrated from Ḥajjāj from ᶜAṭiya al-ᶜAwfā that Ibn ᶜUmar said, "Allāh's Messenger forbade the sale of fruit until its ripeness was evident. He said, 'O Messenger of Allāh, what is meant by its ripeness being evident?' He said, 'When there is no longer any danger of blight and its good condition becomes clear.'"[45]

3.6 The *ḥadiths* on different types of fruit

i) Anas narrated: "Allāh's Messenger forbade the sale of grapes until they had become black and the sale of grains until they had become strong."[46]

ii) Nāfiᶜ narrated that Ibn ᶜUmar said: "Allāh's Messenger forbade the sale of corn until it was white and free from danger of blight."[47]

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[44] Muslim, *Ṣaḥīḥ Muslim*, vol. 2, p. 11.

[45] Aḥmad ibn Ḥanbal, *op. cit.*, vol. 7, p. 102.

[46] al-Tirmidhī, *Ṣaḥīḥ al-Tirmidhī,* vol. 5, p. 236; Abū Dāwūd, *op. cit.*, vol. 3, p. 344; Ibn Mājah, *Sunan Ibn Mājah*, vol. 2, p. 747.

iii) Nāfiᶜ narrated that Ibn ᶜUmar said: "Allāh's Messenger forbade the sale of dates until they had become ripe and the sale of ears of corn until they had become white and free from danger of blight. He forbade that both to the seller and the buyer."[48]

iv) Shuᶜba narrated that ᶜAbd Allāh ibn Dinār heard Ibn ᶜUmar say, "'Allāh's Messenger forbade the sale of fruit or dates until their ripeness was evident.' Ibn ᶜUmar was asked what was meant by their ripeness being evident and he said, 'Till they are free from blight.'"[49]

v) Abū al-Bakhtarī reported, "I asked Ibn ᶜAbbās about the sale of dates. He said, 'Allāh's Messenger forbade the sale of dates on trees until one can eat them or they can be eaten (i.e. [they] are fit to be eaten) or until they can be weighed (or measured).' I said, 'What does that imply (i.e. until they can be weighed)?' A man who was with him (Ibn ᶜAbbās) said, 'Until he is able to keep it with him (after plucking it).'"[50]

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[47] al-Tirmidhī, *op. cit.*, vol. 5, p. 234.

[48] Abū Dāwūd, *op. cit.*, vol. 3, p. 344.

[49] Aḥmad ibn Ḥanbal, *op. cit.*, vol. 7, p. 280.

[50] Muslim, *Ṣaḥīḥ Muslim*, [Translated into English by Abdul Hamid Siddiqi], vol. 3A, p. 15.

3.7 Legal implications

There are many other *ḥadīths* transmitted which, in various words and expressions (*riwāya bi -l-ma^{c}nā*) give a similar meaning. A study of the whole texts of the *ḥadīths* leads us to various conclusions:

a) *Waḍ^{c} al-jawā'iḥ* in the texts of the *ḥadīth* collections

The existence of the texts regarding *waḍ^{c} al-jawā'iḥ* in the books of *ḥadīth* shows that the theory of *ḥawādith ṭāri'a* has strong foundations in the *sunna*. There are twelve *ḥadīths* which are reported in five books of *ḥadīth* collections namely, the *Muwaṭṭā'*, *Ṣaḥīḥ Muslim*, *Sunan Abī Dāwūd*, *Sunan al-Nasā'ī* and *Sunan Ibn Mājah*. One *ḥadīth* is reported in the *Muwaṭṭā'*, two *ḥadīths* are reported in *Ṣaḥīḥ Muslim*, four in *Sunan Abū Dāwūd*, four in *Sunan al-Nasā'ī* and one in *Sunan Ibn Mājah*.

The texts regarding *bay^{c} al-thimār qabla an yabduwa ṣalāḥuhā* are found in all eight books of *ḥadīth* collections. There are fifty six *ḥadīths* documented in eight books of *ḥadīth* collections. Out of fifty six *ḥadīths*, five are reported in the *Muwaṭṭā'*, seven in *Ṣaḥīḥ al-Bukhārī*, eight in *Ṣaḥīḥ Muslim*, three in *Sunan al-Tirmidhī*, seven in *Sunan Abī Dāwūd*, four in *Sunan al-Nasā'ī*, three in *Sunan Ibn Mājah* and nineteen in the *Musnad* of Aḥmad ibn Ḥanbal.

Even though the term *ḥawādith ṭāri'a* does not appear in any *ḥadīth* of *waḍ^{c} al-jawā'iḥ* and *bay^{c} al-thimār qabla an yabduwa ṣalāḥuhā*, we may conclude from the meaning of the *ḥadīths* that the concept of unexpected circumstances is clearly indicated in these *ḥadīths*.

b) The use of various words and expressions to denote only one meaning

The number of *ḥadīths* which have been reported in the books of *ḥadīth* collections is very large. The *ḥadīths* are transmitted through different chains of narrators with the texts being reported and documented in the *ḥadīth* collections. However, the differences in the words and expressions found in *ḥadiths* dealing the issue of *ḥawādith ṭāri'a* do not mean that they are in conflict with each other, but rather, by and large, they complement each other. For instance, the words *yaṭība*,[51] *tuzhiya*,[52] and *tushakkiḥu*[53] mean the 'ripeness of the fruits.' Phrases like 'till their ripeness is evident' (*ḥatta `an yabduwa ṣalāḥuhā*),[54] 'till the Pleiades appeared' (*ḥatta taṭlu^{c} al-thurayyā*),[55]

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[51] al-Bukhārī, *Ṣaḥīḥ al-Bukhārī,* vol. 3, *ḥadīth* no. 394, al-Nawawī, *op. cit*, vol. 10, p. 180.

[52] al-Laythī, *Muwaṭṭā'*, p.398; al-^{c}Asqalānī, *op. cit.*, vol. 4, p. 316, al-Nawawī, *op. cit.*, vol. 10, p. 217; al-Suyūṭī, *Sunan al-Nasā'ī*, vol. 7, p. 264.

[53] al-^{c}Asqalānī, *op. cit.*, vol. 4, p. 315.

[54] al-^{c}Asqalānī, *ibid.*, vol. 4, pp. 313-314; Abū Dāwūd, *op. cit.*, vol. 3, pp. 344-345; al-Nawawī, *op. cit.*, vol. 10, pp. 177-178; al-Shaybānī, *Muwaṭṭā' al-Imām Mālik*, p. 268; Ibn Mājah, *op. cit.*, vol. 2, p. 746.

'till they became black' (*ḥatta yaswadda*)[56] and 'till they are free from danger of blight' (*ḥatta yanjū min al-ᶜāha*)[57] have similar connotations, that is, they refer to the full ripeness of fruit.

Variety also exists in the words and phrases appended to the essential material of the texts. For example, a *ḥadīth* from Jābir in *Sunan al-Nasā'ī* regarding the command by Allāh's Messenger to make a deduction in the payment for something stricken with calamity is different from the text reported by Abū Dāwūd in his *Sunan*.[58] Another example of this kind of variety are the two *ḥadīths* from Jābir which appear in different books of *ḥadīth* collections. Al-Nawawī reports from Jābir that the Prophet said, "If you were to sell fruits to your brother and these are stricken with calamity, it is not permissible for you to get anything from him. Why do you get the wealth

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[55] al-Laythī, *al-Muwaṭṭā'*, p. 399; al-Shaybānī, *ibid.*, p. 268; al-ᶜAsqalānī, *op. cit.*, vol. 4, p. 314.

[56] al-Tirmidhī, *Ṣaḥīḥ al-Tirmidhī,* vol. 5, p. 236; Abū Dāwūd, *op. cit.*, vol. 3, p. 344, Ibn Mājah, *op. cit.*, vol. 2, p. 747.

[57] al-Shaybānī, *op. cit.*, p. 268.

[58] For comparison, al-Suyūṭī reported from Jābir that the Prophet commanded him to make deductions in the payment of something stricken with calamity, meanwhile Abū Dāwūd reported from Jābir as well that the Prophet forbade the selling of years ahead and commanded that deductions have to be made in the payment of something stricken with a calamity. The differentce among these two texts is that the *ḥadīth* reported by Abū Dāwūd has been supplemented with another prohibitìon by the Prophet on the selling of years ahead.

of your brother in the wrong way?"[59] Al-Suyūṭī also reports the same from Jābir but he omits the last part of the text.[60]

c) Variety in the words and expressions used by the same narrators

As mentioned above, one of the obvious characteristics of the texts reported in the books of *ḥadīth* collections on *waḍ^{c} al-jawā'iḥ* and *bay^{c} al-thimār qabla an yabduwa ṣalāḥuhā* is the dissimilarity in the words and phrases used. It is worth noting that this dissimilarity of texts in fact comes from the same narrator. For example, both *ḥadīths* dealing with the prohibition on taking one's property due to the sale of fruits being stricken with calamity are narrated from Jābir.[61] He is also the narrator of two *ḥadīths* regarding the command of the Prophet to make deductions in the payment of something stricken with calamity.[62] Jābir also uses two different words, that is *yaṭība* and *tushakkiḥu*, in order to denote the ripeness of the fruits in two

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[59] al-Nawawī, *op. cit.*, vol. 10, p. 216.

[60] al-Suyūṭī also reported the *ḥadīth* from the same chain of narrators. The whole text of the *ḥadīth* is that the Prophet said: "If someone sells fruits and these are stricken with calamity, he is not permissible to take from his brother."

[61] See al-Nawawī, *op. cit.*, vol. 10, p. 216; al-Suyūṭī, *op. cit.*, vol. 7, pp. 264-265, Abū Dāwūd, *op. cit.*, vol. 3, p. 376, Ibn Mājah, *op. cit.*, vol. 2, p. 747.

[62] See al-Suyūṭī, *op. cit.*, vol. 7, p. 264; Abū Dāwūd, *op. cit.*, vol. 3, p. 376.

different *ḥadīths*.[63] Similarly, ᶜAbd Allāh ibn ᶜUmar narrates *ḥadiths* concerning various types of fruits which are associated with the prohibition of selling fruit before its ripeness is evident.[64] There are also two *ḥadīths* narrated from Anas ibn Mālik on the various types of fruits which relate to the prohibition of that type of sale.[65]

d) The inter-relation between the *ḥadīths* on *waḍᶜ al-jawā'iḥ* and those on *bayᶜ al-thimār qabla an yabduwa ṣalāḥuhā*

In the *ḥadīth* collections the chapter on *waḍᶜ al-jawā'iḥ* is separated from the chapter on *bayᶜ al-thimār qabla an yabduwa ṣalāḥuhā*. As a matter of fact, these two chapters are interrelated and their subject matter is the same, i.e. the prohibition on taking others' property in the event of unexpected circumstances. The *ḥadīth* from Zayd ibn Thābit regarding the prohibition by the Prophet of selling fruit before its ripeness is evident is very important in linking these two chapters, which seem at first glance not to be related to each other.[66] As reported in the *ḥadīth*, the selling of fruits that is spoiled or

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[63] See al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, vol. 7, *ḥadīth* no. 394; al-Nawawī, *op. cit.*, vol. 10, p. 180; al-ᶜAsqalānī, *op. cit.*, vol. 4, p. 315.

[64] See al-Tirmidhī, *op. cit.*, vol. 5, p. 234; Abū Dāwūd, *op. cit.*, vol. 3, p. 344.

[65] See al-Tirmidhī, *ibid.*, vol. 5, p. 234 and p. 236; Abū Dāwūd, *op. cit.*, vol. 3, p. 344; Ibn Majah, *op. cit.*, vol. 2, p. 747.

[66] See al-ᶜAsqalānī, *op. cit.*, vol. 4, pp. 313-314, Abū Dāwūd, *op. cit.*, vol. 3, p. 345. The whole text of the *ḥadīth* narrated by Zayd ibn Thābit: In the lifetime of Allah's Messenger,

blighted is the main reason for the conflict between the buyer and the seller. Therefore, the purpose of the prohibition on selling fruit before its ripeness is evident is to avoid any dispute between the buyer and the seller due to the fruit being stricken with calamity. This fact is supported by other *ḥadīths* which also indicate the correlation between these two factors. For instance, the *ḥadīth* from Abū al-Rijāl Muḥammad ibn ᶜAbd al-Raḥmān from his mother ᶜAmra also addresses the issue of the prohibition of selling fruit until it is free from blight.[67] This issue is reported by ᶜAbd Allāh ibn ᶜUmar in many *ḥadīths* which consistently associate the prohibition on selling fruit before its ripeness is evident with the risk of it being stricken with calamity.[68] Anas ibn Mālik reports a *ḥadīth* on the same issue where the Prophet said, "If Allāh spoiled the fruit, what right would one have to take the money of one's brother?"[69] In another *ḥadīth* related by Anas ibn Mālik, he reports that the

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people used to buy and sell fruit. When they cut their date-fruits and the purchasers came to receive their rights, the sellers would say, "My dates have got rotten, they are blighted with disease afflicted with *quthām* [a disease which causes the fruit to fall before ripening)." They would go on complaining of defects in their purchasers. Allah's Messenger said: "Do not sell fruit before its ripeness is evident," by way of advice for they quarrelled too much.

[67] See al-Shaybānī, *Muwaṭṭā' al-Imām Mālik*, p. 268.

[68] See al-Tirmidhī, *op. cit.*, vol. 5, p. 234; Muslim, *op. cit.*, vol. 2, p. 11, Abū Dāwūd, *op. cit.*, vol. 3, p. 344.

[69] al-Laythī, *al-Muwaṭṭā'*, p. 398; al-ᶜAsqalānī, *op. cit.*, vol. 4, p. 316; al-Nawawī, *op. cit.*, vol. 10, p. 217; al-Suyūṭī, *op. cit.*, vol. 7, p. 264.

Prophet said: "Tell me, when God keeps back the fruit, why should any of you take his brother's property?"[70]

It is obvious that the prohibition on selling fruit before its ripeness is evident is to avoid any dispute among the parties involved in the transaction and to minimise the possibility of loss to any of them. Unexpected circumstances can always arise, as the period between the completion of the contract and the fruit becoming ripe is subject to uncertainty. In this regard, the good condition of the fruit or its ripeness is always subject to the condition of its being free from any danger of blight. The eminent Muslim scholar, Ibn al-ᶜArabī in his commentary on this issue says that the *ḥadīths* on buying fruit before its ripeness is evident correspond in their implications with the *ḥadīths* about fruits being free from any danger of being spoilt by blight.[71] Al-Shawkānī expresses the same opinion, saying that if the fruit is spoilt or afflicted by blight then the buyer has to pay the price without receiving it (fruit) in return.[72]

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[70] al-Suyūṭī, *ibid.*, vol. 7, p. 264.

[71] Ibn al-ᶜArabī, *Ṣaḥīḥ al-Tirmidhī bi Sharḥ al-Imām Ibn al-ᶜArabī al-Mālikī*, vol. 4, pp. 234-235.

[72] al-Shawkānī, *Nayl al-Awṭār*, vol. 5, p. 174.

3.8 The themes of the *ḥadīths* on *ḥawādith ṭāri'a*

Basically, the *ḥadīths* on *ḥawādith ṭāri'a* come under two main categories namely, *waḍ' al-jawā'iḥ* and *bay' al-thimār qabla an yabduwa ṣalāḥuhā*. The *ḥadīths* in these two categories can be classified under several themes:

3.8.1 *Jā'iḥa* on fruit

All the *ḥadīths* on *waḍ' al-jawā'iḥ* and *bay' al-thimār qabla an yabduwa ṣalāḥuhā* refer only to fruit, although they may refer either to fruit in general or to specific types of fruit. Among the other fruits apart from dates which have been mentioned in the *ḥadīths* are corn and grain.

3.8.2 The definitions of *waḍ' al-jawā'iḥ*

The types of calamity included in *waḍ' al-jawā'iḥ* are made clear by the *ḥadīth* from Ibn Jurayj from ʿAṭā' who said that a calamity is any clear disaster caused by rain, cold, locusts, wind or fire.[73] This is the only *ḥadīth* which explains the forms of the disaster included in the scope of *waḍ' al-jawā'iḥ*. From this, we can conclude that the scope of *waḍ' al-jawā'iḥ* is confined to types of natural calamity. In most *ḥadīths* on this matter the

descriptions of calamity are expressed in general terms. However, a *ḥadīth* narrated from Zayd ibn Thābit describes calamity in the form of a disease which causes the fruit to fall before ripening (*quthām*).[74]

3.8.3 The minimum amount of loss

The minimum amount of loss which gives rise to considerations of compensation or the rescinding of the contract is stated in one *ḥadīth*, this amount being one third of the total value. This is reported from Yaḥyā ibn Sa^{c}īd, who stated that there are no deductions in the payment of something stricken with calamity when anything less than one third of the total value is affected.[75] In the *ḥadīth* of ^{c}Amra, the owner of the orchard, after having been advised by the Prophet, gave the purchaser the option of proceeding or of rescinding the contract if the possibility of there being a loss was expected.

3.8.4 The time of ripeness

Pertaining to the good condition of the fruit, at least three methods are used in order to determine its time of ripeness: firstly, by using the time of

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[73] Abū Dāwūd, *op. cit.*, vol. 3, p. 376.

[74] See al-^{c}Asqalānī, *op. cit.*, vol. 4, pp. 313-314; Abū Dāwūd, *op. cit.*, vol. 3, p. 345.

[75] *Ibid.*, p. 376.

the appearance of the Pleiades as an indicator;[76] secondly, by examining the colour of the fruit, such as its being red, yellow or black;[77] and thirdly, from the condition of the fruit itself, including its maturity and fitness for eating.[78] The determination of the good condition of the fruit is important as time is the deciding factor between permissible and illegal transactions.

3.9 The *isnāds* of the *ḥadīth* on *ḥawādith ṭāri'a*

A study of the *ḥadīths* on *ḥawādith ṭāri'a* with respect to their *isnāds* (chain of transmitters) is very important in order to understand the value of the *ḥadīth*. The chain of transmitters of the *ḥadīths* are here examined under the two respective headings of *waḍ^{c} al-jawā'iḥ* and *bay^{c} al-thimār qabla an yabduwa ṣalāḥuhā*.

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[76] See al-Laythī, *al-Muwaṭṭā'*, p. 399; al-Shaybānī, *op. cit.*, p. 268, al-^{c}Asqalānī, *op. cit.*, vol. 4, p. 314.

[77] See al-Laythī, *op. cit.*, p. 398; al-^{c}Asqalānī, *op. cit.*, vol. 4, pp. 315-316; al-Nawawī, *op. cit.*, vol. 10, p. 217; al-Suyūṭī, *op. cit.*, vol. 7, p. 264.

[78] See al-Tirmidhī, *op. cit.*, vol. 2, p. 747.

3.9.1 The *ḥadīths* on *waḍ^{c} al-jawā'iḥ* according to their *isnāds*

If we study the *ḥadīths* on *waḍ^{c} al-jawā'iḥ* from the aspect of *isnād*, we find that these *ḥadīths* only come from four sources, i.e. Jābir, ^{c}Aṭā', ^{c}Amra and Yaḥyā ibn Sa^{c}īd. We shall look at these *ḥadīth* briefly.

3.9.1 (a) The *ḥadīths* transmitted by Jābir

Jābir transmitted two *ḥadīths* with different text. However, these *ḥadīths* are considered as one due to the similarity of the meaning and the *isnād*. These two *ḥadīths* are reported by Muslim, Abū Dāwūd, al-Nasā'ī and Ibn Mājah.

a) In the first *ḥadīth* Jābir narrates that the Prophet said: "If you were to sell fruits to your brother and these are stricken with calamity, it is not permissible for you to get anything from him. Why do you get the wealth of your brother without justification?" This *ḥadīth* is recorded with the following *isnāds*:

i) Muslim reports the *ḥadīth* from Muḥammad ibn ᶜĪbād from Abū Ḍamra from Ibn Jurayj from Abū al-Zubayr from Jābir ibn ᶜAbd Allāh from the Prophet.[79]

ii) Abū Dāwūd reports the *ḥadīth* from two sources: The first is Sulaymān ibn Dāwūd al-Mahrī and Aḥmād ibn Saᶜīd al-Ḥamdanī from Ibn Wahb from Ibn Jurayj from Abū al-Zubayr from Jābir ibn ᶜAbd Allāh from the Prophet, and the second is Muḥammad ibn Maᶜmar from Abū ᶜĀṣim from Ibn Jurayj from Abū al-Zubayr al-Makkī from Jābir ibn ᶜAbd Allāh from the Prophet.[80]

iii) al-Nasā'ī reports from Ibrāhīm ibn al-Ḥasan from Ḥajjāj from Ibn Jurayj from Abū al-Zubayr from Jābir from the Prophet .[81]

iv) Ibn Mājah reports from Hishām ibn ᶜAmmār from Yaḥyā ibn Ḥamza from Thawr ibn Yazīd from Ibn Jurayj from Abū al-Zubayr from Jābir ibn ᶜAbd Allāh from the Prophet.[82]

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[79] See al-Nawawī, *op. cit.*, vol. 10, p. 216.

[80] See Abū Dāwūd, *op. cit.*, vol. 3, p. 376.

[81] See al-Suyūṭī, *op. cit.*, vol. 7, pp. 264-265.

[82] See Ibn Mājah, *op. cit.*, vol. 2, p. 747.

b) The second *ḥadīth* from Jābir is that the Prophet said: "If someone sell fruits and these are stricken with calamity, he is not permitted to take anything from his brother." This *ḥadīth* is reported by al-Nasā'ī only. He reports it from Ḥajjāj from Ibn Jurayj from Abū al-Zubayr from Jābir from the Prophet.[83]

From their obvious similarity of expression, these two *ḥadīths* from Jābir can be considered as one. Presumably, the small amount of variation is the result of different expressions at different times for the same meaning by any of these narrators. It can be seen that all five *isnāds* from these two *hādīths* go back to Ibn Jurayj from Abū al-Zubayr from Jābir from the Prophet.

Jābir transmitted another two *ḥadīths* which also can be considered as variants of one.

a) The first *ḥadīth* is that the Prophet commanded him (Jābir) to make deductions in the payment of something stricken with calamity. al-Nasā'ī reports the *ḥadīth* from Muḥammad ibn ᶜAbd Allāh ibn Yazīd from Sufyān from Ḥumayd from Sulaymān ibn ᶜAtīq from Jābir from the Prophet.[84]

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[83] See al-Suyūṭī, *op. cit.*, vol. 7, p. 265.

[84] *Ibid.*, p. 265.

b) The second *ḥadīth* is that the Prophet forbade the selling of years ahead (*bayᶜ al-sinīn*) and commanded that deductions have to be made in the payment of that stricken with calamity. This *ḥadīth* is reported by Abū Dāwūd from Aḥmad ibn Ḥanbal and Yaḥyā ibn Maᶜīn from Suyfān from Ḥumayd al-Aᶜraj from Sulaymān ibn ᶜAtīq from Jābir from the Prophet.[85]

These two *ḥadīths* share a similarity of transmitters up to the fourth generation; that is from Sufyān from Ḥumayd al-Aᶜraj from Sulaymān ibn ᶜAtīq from Jābir. The subject matter of the *ḥadīths* is the same except that the second *ḥadīth* has an addition, that is the prohibition on the selling of the produce of years ahead.

3.9.1 (b) The *ḥadīth* transmitted by ᶜAṭā'

ᶜAṭā' transmits one *ḥadīth* on *jā'iḥa*, namely, a *ḥadīth* on the definitions of *jā'iḥa*. Abū Dāwūd records the *ḥadīth* from Sulaymān ibn Dāwūd al-Mahrī from Ibn Wahb from Ibn Jurayj from ᶜAṭā' who said that calamities are any disaster caused by rain, cold, locusts, gales or fire.[86]

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[85] See Abū Dāwūd, *op. cit.*, p. 345.

[86] *Ibid.*, p. 345

3.9.1 (c) The *ḥadīth* transmitted by ᶜAmra

ᶜAmra bint ᶜAbd al-Raḥmān transmits one *ḥadīth* on *jā'iḥa*. This *ḥadīth* is regarded as providing a very important principle in the contract of sales in the event of *jā'iḥa*. It is recorded by Mālik from Abū al-Rijāl Muḥammad ibn ᶜAbd al-Raḥmān from his mother ᶜAmra bint ᶜAbd Raḥmān.

3.9.1 (d) The *ḥadīth* transmitted by Yaḥyā ibn Saᶜīd

Yaḥyā ibn Saᶜīd transmits one *ḥadīth* pertaining to the amount of loss occurring in the event of *jā'iḥa*. The *ḥadīth* is recorded by Abū Dāwūd from Ibn Wahb from ᶜUthmān ibn al-Ḥakam from Yaḥyā ibn Saᶜīd who said that there are no deductions in the payment of that stricken with calamity for anything less than one third of the total value of the property.

3.9.2 The *ḥadīths* on *bayᶜ al-thimār qabla an yabduwa ṣalāḥuhā* according to *isnād*

Ḥadīths on *bayᶜ al-thimār qabla an yabduwa ṣalāḥuhā* are transmitted from the Prophet by seven Companions. They are Abū Hurayra, Jābir ibn ᶜAbd Allāh, Anas ibn Mālik, ᶜAbd Allāh ibn ᶜUmar, Zayd ibn Thābit, ᶜAmra bint ᶜAbd al-Raḥmān and Ibn ᶜAbbās.

The *ḥadīths* on the prohibitions of selling fruit before its ripeness is evident is reported by the majority of the imāms of *ḥadīth*, namely, Mālik, Bukhārī, Muslim, Abū Dāwūd, Ibn Mājah and Aḥmad ibn Ḥanbal. Despite the differences in certain phrases, the general meaning of these *ḥadīths* is the same.

3.9.2 (a) The *ḥadīths* transmitted by ᶜAbd Allāh ibn ᶜUmar

A large number of *ḥadīths* are transmitted by ᶜAbd Allāh ibn ᶜUmar on the prohibition of selling fruit before its ripeness is evident. The *ḥadīths* are recorded with the following *isnāds*:

a) Mālik reports one *ḥadīth* in the *Muwaṭṭā'* from Nāfiᶜ from Ibn ᶜUmar that Allāh's Messenger forbade the selling of fruit until its ripeness is evident; he forbade it to the seller and the buyer.[87]

b) Bukhārī reports the same *ḥadīth* with the same wording on the authority of ᶜAbd Allāh ibn Yūsuf from Mālik from Nāfiᶜ from ᶜAbd Allāh ibn ᶜUmar from the Prophet.[88]

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[87] al-Shaybānī, *Muwaṭṭā'*, p. 268.

[88] al-ᶜAsqalānī, *op. cit.*, vol. 4, pp. 313-314.

c) Muslim reports the same *ḥadīth* with the same wording from Yaḥyā ibn Yaḥyā from Mālik from Nāfiᶜ from ᶜAbd Allāh ibn ᶜUmar from the Prophet.[89]

d) Abū Dāwūd reports the same *ḥadīth* with exactly the same wording from ᶜAbd Allāh ibn Maslama al-Qaᶜnabī from Mālik from Nāfiᶜ from ᶜAbd Allāh ibn ᶜUmar from the Prophet.[90]

e) Ibn Mājah reports the same *ḥadīth* with exactly the same wording from Muḥammad ibn Rumḥ from al-Layth ibn Saᶜd from Nāfiᶜ from Ibn ᶜUmar from the Prophet.[91]

f) Aḥmad Ibn Ḥanbal reports nineteen *ḥadīths* on the prohibitions of selling fruit before its ripeness is evident.[92] There are various wording reported by Aḥmad on this matter but the meaning of the *ḥadīths* is the same. The *ḥadīths* recorded by Aḥmad can be summarized as follows:

i) All nineteen *ḥadīths* recorded by Aḥmad are on the authority of Ibn ᶜUmar.

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[89] al-Nawawī, *op. cit.*, vol. 10, pp. 177-178.

[90] Abū Dāwūd, *op. cit.*, vol. 3, p. 344.

[91] Ibn Mājah, *op. cit.*, vol. 2, p. 746.

[92] Aḥmad Ibn Ḥanbal, *op. cit.*, vol. 7, pp. 54, 80, 102, 107-108, 123-124, 125-126, 138-139, 149, 150, 166, 180, 191, 196, 256-257, 269, 280, 285.

ii) There are narrations from eight different persons transmitted through Ibn ᶜUmar, if we confine the chain of transmitters to the generation transmitting from Ibn ᶜUmar. These are ᶜAbd Allāh ibn Dinār, Nāfiᶜ, Ṭāwus, al-ᶜAwfā, ᶜAbd Allāh ibn Surāqa, Zayd ibn al-Jubayr, Sālim and a man from Najrān. The patterns are as follows:

a) five *ḥadīths* from ᶜAbd Allāh ibn Dinār from Ibn ᶜUmar from the Prophet.[93]

b) three *ḥadīths* from Nāfiᶜ from Ibn ᶜUmar from the Prophet.[94]

c) three *ḥadīths* from a man from Najrān from Ibn ᶜUmar from the Prophet.[95]

d) two *ḥadīths* from Ṭāwus from Ibn ᶜUmar from the Prophet.[96]

e) two *ḥadīths* from al-ᶜAwfā from Ibn ᶜUmar from the Prophet.[97]

f) two *ḥadīths* from ᶜAbd Allāh ibn Surāqa from Ibn ᶜUmar from the Prophet.[98]

g) one *ḥadīth* from Zayd ibn al-Jubayr from Ibn ᶜUmar from the Prophet.[99]

h) one *ḥadīth* from Sālim from Ibn ᶜUmar from the Prophet.[100]

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[93] *Ibid.*, pp. 80, 123-124, 150, 256-257, 280.

[94] *Ibid.*, pp. 166, 196, 269.

[95] *Ibid.*, pp. 125-126, 149, 180.

[96] *Ibid.*, pp. 191, 285.

[97] *Ibid.*, pp. 102, 285.

[98] *Ibid.*, pp. 107-108, 138-139.

[99] *Ibid.*, p. 124.

iii) Various words are used by Ibn ᶜUmar to indicate the prohibition, such as *nahā* ("he forbade"), *lā yaṣluhu* ("it is not legal"), *lā tabīᶜu* ("do not sell"). In this regard, we may conclude that Ibn ᶜUmar transmitted the *ḥadīths* using his own words and expressions (*riwāya bi al-maᶜnā).*

3.9.2 (b) The *ḥadīths* transmitted by Jābir ibn ᶜAbd Allāh

Bukhārī, Muslim, Abū Dāwūd, al-Nasā'ī and Ibn Mājah recorded several *ḥadīths* transmitted by Jābir ibn ᶜAbd Allāh on selling fruit before its ripeness is evident. The texts of the *ḥadīths* use varying expressions and describe many different types of fruit, but all have the same practical implication. The *isnāds* of the *hādīths* are as follows:

a) Bukhārī reports two *ḥadīths* from Jābir. The first one contains the prohibition of selling fruit unless it has ripen (*yaṭība*).[101] The second one is from Yaḥyā ibn Saᶜīd from Sālim ibn Ḥibbān from Saᶜīd ibn Minā who said that he heard Jābir ibn ᶜAbd Allāh say: "Allāh's Messenger forbade the selling of fruit until it becomes mellow (*tushakkiḥu*)."[102]

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[101] al-Bukhārī, *Ṣaḥīḥ Bukhārī*, vol. 3, *ḥadīth* no. 394.

[102] al-ᶜAsqalānī, *op. cit.*, vol. 4, p. 315.

b) Muslim reports two *ḥadīths* from Jābir. The first *ḥadīth* has the same wording as the one reported by Bukhārī on the prohibition of selling fruit unless it has ripened (*yaṭība*).[103] It is related from Aḥmad ibn Yūnus from Zuhayr from Abū al-Zubayr from Jābir from the Prophet. Muslim also reports the same *ḥadīth* as the one reported by Bukhārī with the word mellow (*tushakkiḥu*). The *ḥadīth* is from Sālim ibn Ḥibbān from Saᶜīd Ibn Minā from Jābir from the Prophet.

c) Abū Dāwūd reports one *ḥadīth* from the authority of Jābir on this matter. He recorded exactly the same wording and the same *isnād* as that reported by Bukhārī on prohibitions of selling fruit until it becomes mellow (*tushakkiḥu*).[104]

d) Ibn Mājah reports one *ḥadīth* from Jābir on the prohibitions of selling fruit before its ripeness is evident, which is from Hishām ibn ᶜAmmār from Sufyān from Ibn Jurayj from ᶜAṭā' from Jābir from the Prophet.[105]

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[103] al-Nawawī, *op. cit.*, vol. 10, p. 180.

[104] Abū Dāwūd, *op. cit.*, vol. 3, p. 344.

[105] Ibn Mājah, *op. cit.*, vol. 2, p. 746.

e) al-Nasā'ī reports one *ḥadīth* from Jābir on this matter. The phrase used by al-Nasā'ī is 'until it can be eaten' (*ḥattā tuṭ^{c}im*). It is transmitted from Khālid from Hishām from Abū al-Zubayr from Jābir from the Prophet.

3.9.2 (c) The *ḥadīths* transmitted by Anas ibn Mālik

Ḥadīths regarding the prohibitions of selling fruit until its ripeness is evident are also transmitted by Anas ibn Mālik. They are recorded by Mālik, and from him by Bukhārī, Muslim, Abū Dāwūd and Ibn Mājah. The *isnāds* of the *ḥadīths* are as follows:

a) Mālik reports one *ḥadīth* from Ḥumayd al-Ṭawīl from Anas ibn Mālik that the Prophet forbade the selling of fruit until it was almost ripe (*tuzhiya*).[106]

b) Bukhārī reports the same *ḥadīth* on the authority of ^{c}Abd Allāh ibn Yūsuf from Mālik from Ḥumayd from Anas ibn Mālik from the Prophet.[107]

c) Muslim reports the same *ḥadīth* from Mālik from Ḥumayd al-Ṭawīl from Anas ibn Mālik from the Prophet.[108]

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[106] al-Laythī, *op. cit.*, p. 398.

[107] al-^{c}Asqalānī, *op. cit.*, vol. 4, p. 316.

[108] al-Nawawī, *op. cit.*, vol. 10, p. 217.

d) Abū Dāwūd reports another *ḥadīth* regarding this matter with special reference to different types of fruit on the authority of al-Ḥasan ibn ᶜAlī from al-Walīd and ᶜAffān and Sulaymān ibn Ḥarb from Ḥammād ibn Salama from Ḥumayd from Anas who said that the Prophet forbade the selling of grapes until they became black and the selling of grains until they became strong.[109]

e) Ibn Mājah reports the same *hādīth* as that reported by Abū Dāwūd from Muḥammad ibn al-Muthannā from Ḥajjāj from Ḥammād from Ḥumayd from Anas ibn Mālik from the Prophet.[110]

3.9.2 (d) The *ḥadīths* transmitted by Zayd ibn Thābit

Zayd ibn Thābit transmitted several *hādīths* on this matter which are recorded by Mālik and Abū Dāwūd. The *isnāds* are as follows:

a) Mālik reports one *ḥadīth* regarding the prohibitions of selling fruits until the Pleiades (*al-thurayyā*) appear.[111] This is recorded from Abū al-Zinād from Khārija ibn Zayd from Zayd ibn Thābit.

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[109] Abū Dāwūd, *op. cit.*, vol. 3, p. 344.

[110] Ibn Mājah, *op. cit.*, vol. 2, p. 747.

[111] al-Laythī, *op. cit.*, p. 399.

b) Abū Dāwūd reports one *ḥadīth* from Zayd ibn Thābit regarding fruit being stricken by *quthām*.[112] This is recorded from ᶜUrwah ibn al-Zubayr from Sahl ibn Abī Ḥathma from Zayd ibn Thābit.

3.9.2 (e) The *ḥadīth* transmitted by ᶜAmra bint ᶜAbd al-Raḥmān

There is only one *ḥadīth* transmitted by ᶜAmra regarding this matter which is that recorded by Mālik from Abū al-Rijāl Muḥammad ibn ᶜAbd al-Raḥmān ibn Ḥāritha from his mother ᶜAmra bint ᶜAbd al-Raḥmān.[113]

Conclusion

This chapter shows the authoritative basis of the legality of the theory of *ḥawādith ṭāri'a* in Islam. It is agreed that the Qur'ān does not explicitly provide an authoritative text on this particular area and such a situation refers to the characteristic of the Qur'ān itself as a source of *ḥukm* in Islām. Instead of providing a specific provision for *ḥawādith ṭāri'a*, its provision comes in general terms, through various concepts, particularly those of justice and equity. It also provides the general prohibition on consuming others'

[112] Abū Dāwūd, *op. cit.*, vol. 3, p. 345.

[113] al-Shaybānī, *op. cit.*, p. 268.

property in a wrongful manner, which can be said to encompass the very nature of the consumption of property in cases of *ḥawādith ṭāri'a*.

Apart from these general provisions in the Qur'ān, a theory of *ḥawādith ṭāri'a* can also be built around several legal maxims dealing with the rules of need and necessity. However, the most significant source of such a theory comes from the *ḥadīth* of the Prophet. A lengthy discussion of the *ḥadīth* shows that all the elements underpinning such a theory can be found in the *ḥadīth* of the Prophet. This includes a definition of *ḥawādith ṭāri'a* and matters pertaining contracts of sales and leasing, and the setting of a minimum amount of loss and the compensation thereof.

To sum up, the absolute recognition in *sharī'a* of the theory lies in a characteristic of the *sharī'a* itself. The flexibility (*murūna*) of the *sharī'a* under the guidance of the Qur'ān and the *sunna* has undoubtedly made a major contribution to the dynamic process of the evolution of the *sharī'a* in its safeguarding of people's interests in this world.

CHAPTER IV

WAḌ^{c} AL-JAWĀ'IḤ IN COMMERCIAL TRANSACTIONS

4.0 Introduction

The term *waḍ^{c} al-jawā'iḥ* has its origin in the tradition of the Prophet Muḥammad who commanded that deductions have to be made in the payment of crops that have been stricken with a calamity.[1] In another *ḥadīth* the Prophet said, "If you were to sell fruits to your brother and these were stricken with a calamity, it would not be permissible for you to get anything from him."[2] Ibn Taimiyya makes the point that *waḍ^{c} al-jawā'iḥ* falls within the scope of the maxim "Damage to the object of the contracts before it is possible to take possession of it"[3] [*talaf al-maqṣūd al-ma^{c}qūd ^{c}alaīh qabla al-tamakkun min qabḍih*]. The prohibitions on consuming others' property without right have been stressed by Allāh in many verses in the Qur'ān: "O you who believe! Do not consume your property among yourselves without

[1] Muslim, *Ṣaḥīḥ Muslim*, vol. 2, p.26; al-Suyūṭī, *Sunan al-Nasā'ī*, vol. 7, p. 265.

[2] Muslim, *Ṣaḥīḥ Muslim*, vol. 2, 26.

[3] Ibn Taimīyya, *Majmū^{c} Fatāwā,* Riyāḍ, 1383H, vol. 30, p. 263.

right, but let there be amongst you traffic and trade by mutual good will...."[4] In another verse it says: "And do not consume your property among yourselves without right, nor use it as bait for the judges, with intent that you may eat wrongfully and knowingly of (other) people's property."[5]

The purpose of a contract in commercial transactions is to take possession of the property. Both parties in the contract are bound to fulfil their obligations as stipulated in the contract. One way of consuming others' property without right is by preventing the other party in the transaction from taking possession of the property. On this basis, taking others' property when their property has been struck with calamity is tantamount to consuming others' property without right.

The discussions in this chapter will concentrate on the nature of *jā'iḥa* as the most significant element in the event of unexpected circumstances and its relation to various types of contract in commercial transactions.

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[4] Q, *al-Nisā'* (4): 29.

[5] Q, *al-Baqara*, (2): 188.

4.1 Definition of *jā'iḥa*

Literally, the word *jā'iḥa* [pl. *jawā'iḥ*] is defined as a calamity that destroys men's property.[6] More specifically, it denotes a calamity, bane, pest, drought or the like which destroys property and cattle, or civil war or conflict and faction and the like; it could also be due to the effect of large hail or excessive cold or heat.[7] In his *Sunan*, Abū Dāwūd has defined *waḍ^{c} al-jawā'iḥ* as a disaster caused by rain, cold, locusts, wind or fire.[8]

Technically, it is defined as an unavoidable event which destroys fruits or crops after the completion of a contract of sale.[9] al-Shāfi^{c}ī has widened the scope of *jā'iḥa* to include disasters caused not only by natural calamities but also by men.[10] According to al-Qurṭubī, *jā'iḥa* is a calamity caused by fire, wind, snow, rain, decay, locusts or the invasion of an army.[11] Ibn Taimiyya expresses his view that *jā'iḥa* is a natural calamity where no one is liable for any destruction, for instance, a disaster caused by wind, cold, fire, rain, frost,

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[6] al-Zubaydī, *Tāj al-^{c}Urūs*, Cairo,1965, vol. 4, p. 355.

[7] Lane, Lexicon, vol. 1, p. 481.

[8] Abū Dāwūd, *Sunan Abū Dāwūd*, vol. 3, p. 376.

[9] al-Dirdīr, *Bulghat al-Sālik li 'Aqrab al-Masālik,* vol. 2, p. 87.

[10] al-Shāfi^{c}ī, *al-Umm,* vol. 3, p. 59.

[11] al-Qurṭubī, *al-Kāfī*, p. 335.

lightning and the like. He points out that if the property is destroyed by men, the responsibility to pay compensation would devolve on them.[12]

4.2 The legal basis for *waḍ' al-jawā'iḥ*

The concept of *waḍ' al-jawā'iḥ* has its foundation in *ḥadīths* of the Prophet.[13] *Ḥadīths* on this matter are accepted among the *muḥaddithīn* and have been reported by Mālik[14], Muslim[15], Abū Dāwūd[16], Ibn Mājah[17] and al-Nasā'i[18]. There is no evidence to indicate that any of the other scholars of *ḥadīth* reject these *ḥadīths*. *Ḥadīths* on *jā'iḥa* are in conformity with verses in the Qur'ān regarding the prohibitions on consuming others' property without right.[19] Furthermore, *waḍ' al-jawā'iḥ* is a long standing practice which was agreed upon by the Companions and the Followers.[20]

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[12] Ibn Taimīyya, *op.cit.*, p. 278.

[13] Two *ḥadīths* are reported by Muslim in his *Ṣaḥīḥ*. See page 158.

[14] Mālik, *al-Muwaṭṭā'*, p. 400.

[15] Muslim, *Ṣaḥīḥ Muslim*, vol. 2, p. 26.

[16] Abū Dāwūd, *Sunan Abū Dāwūd*, vol. 3, p. 376.

[17] Ibn Majah, *Sunan ibn Mājah*, vol. 2, p. 747.

[18] al-Suyūṭī, *Sunan al-Nasā'i*, vol. 7, pp. 264-265.

[19] Q., *al-Baqara* (2): 188, *al-Nisā'* (4): 29.

[20] Ibn Taimīyya, *op.cit.* p. 270.

It is worth noting that the Madinans from the time of the Prophet practised the ruling on *jā'iḥa*, followed by later jurists such as al-Qāsim ibn Muḥammad and Yaḥyā ibn Sa^{c}īd up until the time of Mālik and others. Further, its legal foundation is strengthened by obvious analogy (*al-qiyās al-jalī*). In his *ḥadīth*, the Prophet says that if you were to sell fruits to your brother and these were stricken with calamity, it would not be permissible for you to get anything from him. Then, the Prophet explains the ^{c}*illa* for the prohibition by saying, "Why do you take the wealth of your brother without justification." This is an indication of what the Qur'ān says regarding the prohibition of consuming other's property without right. If the property is damaged before taking possession, then taking the money is tantamount to consuming other's property without right, which is prohibited by Allāh.

However, the jurists differ regarding their perception of the legality of this ruling. Mālik and his disciples agreed with this ruling and this is also the position held by the jurists of *ḥadīth* (*fuqahā' al-ḥadīth*) such as Aḥmad and his followers, Abū ^{c}Ubaīd and al-Shāfi^{c}ī's earlier opinion. In his later opinion, al-Shāfi^{c}i reserves his view due to the uncertainty of the status of the *ḥadīth*.[21] He says: "There is no evidence to me that the Prophet was saying that the deductions in payment have to be made for something stricken with a

[21] Ibn Taimiyya, *op.cit.* p. 270; al-Nawawi, *Kitāb Majmū^{c} Sharḥ Muhadhdhab li -l-Shirāzī*, vol. 12, p. 171.

calamity. If the *ḥadīth* is established, deductions are a must, both in small and large quantities."[22] Abū Ḥanīfa, al-Thawrī and al-Layth, however, did not agree on this rule.[23]

The authority of those who agree upon this ruling is based on the *ḥadīth* of the Prophet who commanded that deductions have to be made in the price of something that is stricken with a calamity and the *ḥadīth* of his prohibition of taking others' property without right in the event of *jā'iḥa.* They support their view with *qiyās al-shibh,*[24] from which it follows that the goods (*mabīᶜ*) are still in the possession of the seller due to the fact that it is his responsibility to water the goods until they ripen: therefore, the liability is his. The difference, according to them, between this sale and other types of sale is that this sale has been explicitly recognised by law, although the goods have not ripened yet. It is as if He (by His attribute the Lawgiver) exempted it from the category of sales of what has not yet been created. Thus, the liability is on the seller, unlike the normal pattern for most other sales.[25]

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[22] Ibn Rushd, *Bidāyat al-Mujtahid*, vol. 2, p. 187; Ibn Taimīyya, *op.cit.*, p. 270.

[23] Ibn Rushd, *Bidāyat al-Mujtahid*, vol. 2, p. 186.

[24] *Qiyās al-shibh* is an analogy on the basis of attributes that cannot qualify as underlying causes in the strict form of *qiyās al-ᶜilla.* Thus, it is a form of analogy that is more flexible than *qiyās al-ᶜilla.*

[25] Ibn Rushd, *Bidāyat al-Mujtahid*, vol. 2, p. 186.

The argument of those who do not favour this ruling is based on a comparison of this sale with all the other types of sale and the assertion that the letting go of the goods by the seller in this sale amounts to possession by the buyer. Therefore, the liability is on the buyer. There is also a *ḥadīth* from Abū Saᶜīd al-Khudrī who reported that in the time of the Prophet a man suffered loss in fruits he had bought and his debt increased. The Prophet told (the people) to give him charity (*ṣadaqa*) and they gave him charity, but it was not sufficient to pay the debt in full, so the Prophet said to his creditors, "Take what you find and you will have nothing more than that." They point out that the Prophet did not give his judgement on *jā'iḥa* in this case.[26]

The point of disagreement in this case is that there are *ḥadīths* which give different solutions to this matter as well as the contradictions that result from deriving rules by analogy. Those who are against the ruling on *jā'iḥa* say that the command on *jā'iḥa* was laid down in connection with the prohibition of selling fruit before its ripeness is evident. They further assert that this is supported by the fact that when complaints about *jā'iḥa* became numerous, they were told not to sell their fruit until it had begun to ripen, as reported in the *ḥadīth* of Zayd ibn Thābit.[27] Those, however, who permit the

[26] *Ibid.*, pp. 186-187.

[27] The *ḥadīth* narrated by Zayd ibn Thābit says: "In the lifetime of the Prophet, the people used to trade with fruits. When they cut their date-fruits and the purchasers came to receive their right, the sellers would say, 'My dates have got rotten; they are blighted with disease,

ruling, based on the *ḥadīth* of Abū Sa^{c}īd al-Khudrī, claim that perhaps the seller in that case was destitute, meaning that the Prophet did not give a ruling about deductions on the basis of *jā'iḥa*, or that the quantity affected by *jā'iḥa* was such that it was not sufficient to justify a ruling on *jā'iḥa* or that at the time in which this happened infection by disease was not a problem.[28]

Even though Abū Ḥanīfa does not recognise the *ḥadīth* on *jā'iḥa*, in principle he does not reject the general concept of *jā'iḥa*. His views on *jā'iḥa* can be established indirectly from the *ḥadīths* on the prohibition of selling fruit before its ripeness is evident. Furthermore, jurists in the Ḥanafī school permit the rules of cancellation of leasing (*ijāra*) on the grounds of excuse (*al-'a^{c}dhār*).[29] According to Abū Ḥanīfa, there is no difference between selling fruit before or after its ripeness is evident. He maintains that the stipulation of leaving the fruit on the trees is not permitted and the generality occurring in the *ḥadīth* implies picking. His argument is that the definite contract of the transaction requires immediate delivery, otherwise it involves uncertainty (*gharar*). Therefore, it is not permissible to sell things with a delayed period involved. In this case, if the fruits spoil in the hand of the

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they are afflicted with *quthām* (a disease which causes the fruit to fall before ripening).' They would go complaining of defects in their purchasers. The Prophet said: 'Do not sell the fruits before their ripeness is evident.'" See page 128.

[28] Ibn Rushd, *Bidāyat al-Mujtahid*, vol.2, p. 187; al-Nawawi, *Kitāb Majmū^{c}*, vol. 12, p. 171.

[29] al-Zuḥaylī, *al-Fiqh al-Islāmi wa Adillatuh*, vol. 4, p. 302.

buyer after the completion of the contract, it is considered as spoiling after delivery. He derives his ruling from the rule of leasing. According to him, the benefits from a contract of leasing cannot be considered fulfilled by the completion of the contract or the possessing of the goods (*qabḍ al-ᶜaīn*) *per se*. Therefore, the contract of leasing is rescinded by the death of one of the parties in the contract or for other reasons.[30]

From the above discussion, it is appropriate to conclude that *jā'iḥa* has its foundations in the *sharīᶜa*. Although the jurists are in disagreement on *waḍᶜ al-jawā'iḥ*, they are in agreement that if there is destruction of the object of a sale, the rules of compensation (*ḍamān*) for damage will apply to goods before the buyer takes possession. Al-Shāfiᶜī expresses his view that if the damage occurs before the buyer takes possession then compensation is the liability of the seller in all kinds of goods. He extends this ruling to other types of transaction.[31] Abū Ḥanīfa points out that this ruling is extended to include every type of transaction that involves moveable goods. Mālik and Aḥmad hold that the matter comes under the rules of *waḍᶜ al-jawā'iḥ*, and they make a distinction between goods that can be possessed immediately after the conclusion of a contract due to their existence at the time and place

[30] Ibn Taimīyya, *op.cit.*, p. 271.

[31] al-Shāfiᶜī, *al-Umm*, vol. 3, p. 59.

of the contract (*al-ᶜaīn al-ḥādira*) and those that cannot be immediately possessed.[32]

4.3 The causes of *waḍᶜ al-jawā'iḥ*

Jā'iḥa is a calamity that destroys men's property. In more specific words, it denotes a calamity, bane, pest, drought or the like which destroys the property. It also includes destruction resulting from civil war or conflict and the like or from the effect of large hail or excessive cold and heat.[33] Abū Dāwūd in his *Sunan* defines it as a disaster caused by rain, cold, locusts, wind or fire.[34] According to Ibn Taimiyya, *jā'iḥa* is a natural calamity for which no one is liable for any destruction, for instance, a disaster caused by wind, cold, fire, rain, frost, lightning and the like.[35]

In the light of the definitions of *al-jā'iḥa*, jurists have expressed their views regarding the causes of *waḍ al-jawā'iḥ*. As far as the natural calamities that strike fruits are concerned such as cold, drought, flood and decay, there

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[32] al-Shāfiᶜī, *al-Umm*, vol. 3, p. 272.

[33] Lane, Lexicon, vol. I, p. 481.

[34] Abū Dāwūd, *Sunan Abū Dāwūd*, vol. 3, p. 376.

[35] Ibn Taimīyya, *op.cit.*, p. 278.

is no dispute among the school that these are *jā'iḥa*. However, they are of different opinions as to events caused by men.[36]

4.3.1 The types of the causes

Generally, the scholars of the Mālikī, Shāfiᶜī and Ḥanbalī *madhhabs* have arrived at a consensus that any type of disaster caused by an act of God is *jā'iḥa*. Al-Shāfiᶜi, in his early opinion also includes acts of man as a cause of *jā'iḥa*.[37] However, regarding the cause of *jā'iḥa*, the Mālikīs go into more detail in dealing with different types of disaster. There are two opinions among the Mālikīs. Some hold the view that *jā'iḥa* is any calamity caused by both natural disasters and men, while others say that it results from natural calamities only. Those who hold the view that it includes damage resulting from human action are further divided into two opinions: the first maintains that an act of men which is irresistible such as the descending of an army falls under *jā'iḥa*, while that which can be guarded against, like theft, is not; the second maintains that any act of men whether irresistible or not is *jā'iḥa*.[38]

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[36] Ibn Rushd, *Bidāyat al-Mujtahid,* vol. 2, p. 187.

[37] al-Shāfiᶜī, *al-Umm*, vol. 3, p.61.

[38] Ibn Rushd, *Bidāyat al-Mujtahid*, vol. 2, pp. 187-188.

Those who consider it only to include natural calamities or acts of God rely on the overt meaning of the saying of the Prophet, "What would you think if Allāh were to prevent the fruit (from ripening)?" Those who hold that it includes the acts of men assert that the acts of men are analogous with the acts of God.[39] Mālik himself holds that the descending of an army is *jā'iḥa* but that theft is not.[40] The Mālikī jurist, Ibn al-Qāsim, says that any disaster that strikes fruits in any form is *jā'iḥa*, including theft. He further explains that *jā'iḥa* is any disaster that cannot be guarded against, even if we are aware of it. Thus, according to him, theft is not a *jā'iḥa* if we are aware of it and capable of guarding against it.[41] Other Mālikī jurists, including Muṭarrif and Ibn al-Mājishūn, however, hold the view that *jā'iḥa* is a disaster that strikes fruits by the act of God alone.[42]

It is worth noting that Mālik has laid down in detail the causes of *jā'iḥa.* According to him, acts of God like cold, drought, locusts, flood and decay are *jā'iḥa*. He also points out that as far as water is concerned, if the disaster is caused by a shortage of spring water *(mā' al-ᶜuyūn)*, it is *jā'iḥa*. Even though he is silent on rain, he emphasises that any negative effect on the fruit

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[39] Ibn Rushd, *Bidāyat al-Mujtahid*, vol.2, p.188.

[40] Mālik, *al-Mudawwana al-Kubrā*, vol. 5, p.38.

[41] *Ibid.*, p. 232.

[42] *Ibid.*, pp. 232-233.

because of a shortage of water is considered *jā'iḥa*. Mālik also points out that fruit destroyed by a large number of birds is *jā'iḥa*, as is that which is blighted by a hot wind (*samūm*).[43]

According to Saḥnūn, rain is the same as spring water in terms of its function in helping plants grow. Accordingly, if the crop perishes because of lack of rain, Saḥnūn includes that as *jā'iḥa*, sharing his view with Mālik on the possibility of *jā'iḥa* due to shortage of water. He also includes fire, cold and flood as agents of destruction included in the scope of *jā'iḥa*.[44]

The jurists in the Ḥanbalī school are of the opinion that *jā'iḥa* can be caused either by acts of God or the actions of men. In the event of destruction caused by the acts of God, no one is liable for compensation, whereas if the destruction is caused by men who are liable for that, then this becomes a matter of damaging property before taking possession. In the event of destruction caused by men who cannot be held liable, such as in the case of an invading army, there are two opinions: firstly, that this is not *jā'iḥa* and secondly, sharing the view of the Mālikīs, that this is indeed *jā'iḥa*.[45] Ibn

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[43] *Ibid.*, p. 37.

[44] *Ibid.*, pp. 37-38.

[45] Ibn Taimiyya, *Majmūᶜ Fatāwa*, vol. 30, p. 278.

Taimiyya goes into further detail by drawing a distinction between destruction caused by the seller or the buyer or a third party or by acts of God in relation to the status of the contract and compensation.[46]

Even though there is no definite definition by jurists of *jā'iḥa*, it is sufficient to conclude that any calamity caused by one of the following is included in the scope of *jāiḥa*:

i) calamities caused by acts of God only;

ii) calamities caused by acts of God and the actions of men;

iii) calamities caused by the actions of men only.

4.3.2 The objects of *jā'iḥa*

The objects of *jā'iḥa* are fruit and vegetables. There is no dispute about fruit among jurists of every school, but for vegetables, the better known opinion is that the ruling of *jā'iḥa* is applied to them.[47] The objects of *jā'iḥa* may also include anything that can be classified as fruits. In this regard jurists have divided fruits into two types:

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[46] *Ibid.*, p. 267.

[47] Ibn Rushd, *Bidāyat al-Mujtahid*, vol. 2, p. 188.

a) Fruits that maintain their ripeness when bought at the time that their ripeness is evident, such as dates, grapes, apples, water melons, jasmine, roses and peanuts.

b) Fruits that maintain their moisture and freshness when bought after their ripeness is over, such as grapes, sugar cane, turnips, carrots, onions and garlic.[48]

In the Mālikī school, jurists are in agreement on two points:

a) that the ruling of *jā'iḥa* is only applicable to the type of produce that must be in fresh condition in order to maintain its good quality, such as onions, cucumbers, water melons and the like;

b) that the ruling of *jāiḥa* is not applicable to fruits that do not need to be in fresh condition to maintain their good condition, such as dried dates, and figs.[49]

However, there is a point of disagreement among them regarding fruits the freshness of which lasts for a short time, such as grapes, barley, vegetables, sugar cane and crops grown under the earth. According to Ibn al-Qāsim, if dates which are clearly in good condition are bought on the tree and are subsequently stricken by *jā'iḥa*, there is no liability on the seller. The

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[48] *Ibid.*, p. 233.

[49] Mālik, *al-Mudawwana al-Kubrā*, vol. 5, pp. 33-34.

same applies to sugar cane.[50] Saḥnūn held that if the grapes are stricken by *jā'iḥa* on the day of picking then the ruling on *jā'iḥa* is not applicable to them. Saḥnūn also reports from Ibn al-Qāsim that if sugar cane, vegetables and barley are stricken by *jā'iḥa*, the ruling on *jā'iḥa* is applied to them. With regard to vegetables, there are two opinions among the Mālikīs. Some of them hold the view that the rules of *jā'iḥa* are applicable to them and the others not. The disagreement goes back to their views on the possibility of classifying vegetables as fruits.[51]

There are also two opinions among the Ḥanbalī jurists on the object of *jā'iḥa*. According to Aḥmad, *jā'iḥa* is only applicable to dates.[52] Qāḍī Abū Ya^{c}lā interprets this as meaning that Aḥmad wished to exclude other crops and vegetables with that statement.[53] Therefore, there are two opinions regarding crops as a valid object of *jā'iḥa*:

a) The rules of *jā'iḥa* are not applicable to them. The reason is that the crops are not being purchased unless they are completely ripe and have been separated from the ear. However, the rules are applicable if the condition of

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[50] *Ibid.*, p. 33.

[51] *Ibid.*, p. 233; al-Qurṭubī, *al-Kāfī*, p. 334.

[52] Ibn Taimiyya, *op.cit.*, p. 280.

[53]The word *jawā'iḥ* in the *ḥadīth* of the Prophet probably refers to dates. The rest of the plant is included in the ruling by analogy, not explicitly by the text. It can be concluded that way because trees in Madīna are palm trees.

the crops is good and this has been sustained for a long time. This is due to the fact that the crops are now permissible for being traded with.[54] Ḥanbalī jurists further say that the rules of *jā'iḥa* are not applicable to crops which are sold dry. This view is shared by Abū Ḥanīfa and by al-Shāfiᶜī in his later opinion.[55]

b) The rules of *jā'iḥa* are applicable to crops as well as fruits. This view is derived from the *ḥadīth*: "The Prophet forbade the sale of grapes till they were black, and the sale of grains till they had become strong." The sale of grapes after they are black is like the sale of grains when they have become strong. From the time they become strong until the time of harvesting there is a period where they can be struck by *jā'iḥa*.[56]

With regard to the valid objects of *jā'iḥa*, the view generally held by jurists in the Shāfiᶜī *madhhab* is that of al-Shāfiᶜī himself. He says:

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[54] This was the view held by Ibn Taimiyya during his stay in Baghdād. He shared Aḥmad's stand on this matter. When asked about *jā'iḥa* on plants, he replied that the rules of *jā'iḥa* are applicable to dates.

[55] Ibn Taimiyya, *op.cit.*, p. 280.

[56] *Ibid.*, pp. 280-281.

> "*Jā'iḥa* may occur on fruits which are purchased dry or wet. It may also occur on the purchasing of fruits which are still on the tree but stricken with calamity before the harvesting season."[57]

In addition to fruits, al-Nawawī, a jurist from the Shāfiᶜī school, says that the objects of *jā'iḥa* include vegetables.[58]

4.4 The minimum quantity of loss of *ja'iha*

Another feature of *jā'iḥa* which has been treated quite extensively by the jurists is the minimum quantity of loss which can be treated as *jā'iḥa.* There are two main issues covered by the jurists with regard to the minimum quantity that must be involved for the rules of *jā'iḥa* to be applicable. The first issue is the necessity to distinguish between small and large quantities of loss and the minimum amount of loss required for different types of objects, and the second is to determine the method of ascertaining the minimum amount of loss of the object.

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[57] al-Shāfiᶜī, *al-Umm*, vol. 2, p. 59.

[58] al-Nawawi, *Kitāb Majmūᶜ*, vol. 12, p. 172.

4.4.1 Quantity of loss

Generally, with regard to distinguishing the dividing line between small and large quantities of loss, the jurists have arrived at different opinions. However, there appears to be agreement amongst them as to the minimum amount of loss for fruits in particular. This is mainly because the source for this particular issue is laid down by the Prophet as reported from Yaḥyā ibn Sa^{c}īd that no deductions in the payment of something stricken with *jā'iḥa* should be made if anything less than one third of the total value is affected.[59] A distinction between small and large quantities of loss is seen as obligatory, as it is well-known through practice that a small quantity of fruit is lost from every yield of fruit. [60] The law also demands a distinction between small and large quantities as a basis for consideration of compensation. In this respect, the amount of one-third of the produce is considered to be the dividing line between small and large quantities, and the law has considered it such on many occasion.[61] Mālik obviously advocates that the rules of *jā'iḥa* are

[59] Abū Dāwūd, *Sunan Abū Dāwūd*, v. 3, p. 326.

[60] al-Qurṭubī, *Bidāyat al-Mujtahid*, vol. 2, p. 188; al-Bājī, *al-Muntaqā*, vol. 4. , p. 236.

[61] al-Qurṭubī, *Bidāyat al-Mujtahid*, vol. 2, p. 189.

applicable to the buyer for the loss of one-third and upwards.[62] It is for this same reason that al-Shāfiᶜī in his later opinion said:

> "If I had upheld an opinion about *jā'iḥa,* I would have distinguished between less and more, and the consideration of a third as a criterion for less and more is laid down as a text in *waṣiyya* (bequest), as the Prophet said, "A third, and a third is more than enough."[63]

However, the amount of one-third as a determination of the minimum amount of loss is not absolute, simply because the jurists have approached the matter from various angles and produced different results. There are at least two ways that the jurists have approached this matter: firstly, by looking into the types of the objects of *jā'iḥa* as a decisive factor in determining the minimum amount of loss; and secondly, the way the crops are cultivated. In approaching the types of object, jurists have divided them into three types: firstly, fruit; secondly, vegetables and crops grown under the earth; and thirdly, those crops which are similar to vegetables.[64]

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[62] Mālik, *op.cit.*, p. 25; al-Bājī, *al-Muntaqā,* vol. 4, p. 236, al-Qurṭubī, *al-Kāfī,* p. 334, al-Laythī, *al-Muwaṭṭā',* p. 400; al-Zurqānī, *Sharḥ al-Zurqānī,* vol. 3, p. 341; Ibn Taimiyya, *op.cit.,* vol. 30, p. 279.

[63] Ibn Rushd, *Bidāyat al-Mujtahid*, vol. 2, p. 189.

[64] al-Bājī, *op.cit.*, p. 235.

As mentioned before, the jurists arrived at a consensus that the minimum amount of loss for fruits is one-third of the total value.[65] In the case of vegetables, the jurists are of different opinions. According to Ibn al-Qāsim, the rules of *jā'iḥa* are applied to all quantities, even when the amount affected is less than one-third.[66] However, according to ᶜAlī ibn Ziyād the rules of *jā'iḥa* are only applicable if the minimum loss of one-third is sustained, in vegetables as well as fruits.[67] In the case of crops such as cucumbers, water melons, pumpkins and the like, Ibn al-Qāsim and the majority of the Mālikis hold the view that the minimum amount required is one third. Ashhab is of the opinion that cucumber is akin to other vegetables; therefore, the rules of *jā'iḥa* are applied to all quantities.[68]

There is another criterion for the jurists in determining the minimum amount of loss. They take into account the way the crops are maintained, and arrived at a ruling that the rules of *jā'iḥa* are not applicable to crops which need watering, except if the amount of the loss is one-third or greater. In the case of crops which do not need watering, the rules of *jā'iḥa* are applicable to

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[65] Mālik, *op.cit.*, p. 25; al-Bājī, *op.cit.*, p. 235; Ibn. Rushd, *Bidāyat al-Mujtahid,* vol. 2, p. 189; al-Dirdīr, *op.cit.,* vol. 2, p. 87; al-Shāfiᶜī, *al-Umm,* vol. 3, p. 57; al-Baghawī, *op.cit.*, vol. 3, p. 393.

[66] Mālik, *op.cit.*, p. 32; al-Bājī, *op.cit.*, p. 235; al-Dirdīr, *op.cit.*, p. 87.

[67] Mālik, *op.cit.*, p. 32; al-Bājī, *op.cit.*, p. 235; Ibn ᶜAbd al-Barr, *al-Kāfī fī fiqh ahl al-Madīna al-Mālikī*, Beirut, 1407H/1987M, p. 334.

[68] al-Bājī, *op.cit.*, p. 235.

all quantities. Bananas are an exception to this ruling. They do not need watering, but the rules of *jā'iḥa* are only applicable if the amount of loss is one-third or greater. According to Ibn Rushd, there is a principle expounded by Ibn al-Qāsim as reported by Saḥnūn that the rules of *jā'iḥa* are not applicable to any crop which needs watering unless the amount of loss is one-third or greater, but are applicable to crops which do not need watering to any degree.[69]

4.4.2 Evaluation of loss

The second issue covered by the jurists in ascertaining the minimum amount of loss is the establishment of a method for evaluating the loss. There are in fact two methods of evaluation: a third of the fruit by measure and a third of the value of the fruit. Ibn al-Qāsim adheres to the former, while Ashhab takes the latter approach.[70] According to Ashhab, if fruit amounting to a third of the value through measure is lost, one-third of the price is forfeit, irrespective of whether a third (in value) is equivalent to a third in measure. Meanwhile, according to Ibn al-Qāsim, when a third measure of the fruit is lost, the price should be reduced by a third if the fruit is of one

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[69] Ibn Rushd, *al-Bayān wa -l-Taḥṣīl,* vol. 12, p. 164.

[70] Ibn Rushd, *Bidāyat al-Mujtahid,* vol. 2, p. 188; al-Bājī, *op.cit.*, pp. 235-236.

type and the decrease in price is equivalent to the value of the damaged stock. If the fruit is of several different kinds, with differing values, or of different stocks with differing values, one should compare the value of the lost third with the total value and reduce it accordingly. So, in some cases, he considers measure only when the value of the different stocks included in the fruit concerned is the same, while at other times he considers both (that is measure and value) when the values differ.[71]

Al-Bājī illustrates the problem by saying that if there is a contract of sales of different kinds of fruit such as grapes, figs, pomegranates, quinces, jasmine and roses, and one of them is stricken by *jā'iḥa* while the rest remain safe, or if each of them is stricken by *jā'iḥa,* the evaluation of the loss is assessed individually for each of them, and, if the amount lost is one-third, then the rules of *jā'iḥa* are applicable to them. If the loss is less than one-third, then the rules are not applicable.[72]

Ibn Ḥabīb reports from Mālik from Ibn al-Mawwāz from Aṣbagh, that in a case of *jā'iḥa* the total value of the property is considered, whether the loss is sustained by one orchard or more. Mālik points out the reason why one third is the minimum amount of *jā'iḥa*. According to him, the stipulation

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[71] Ibn Rushd, *Bidāyat al-Mujtahid,* vol. 2. p. 188.

[72] al-Bājī, *op.cit.*, p. 235.

of one-third as a measurement of loss classifiable as *jā'iḥa* is in order to distinguish it from ordinary loss. If someone buys orchards of the same type, and one of them is stricken by *jā'iḥa,* the rules will be applied accordingly if the amount of the loss is one-third or greater.[73]

It is interesting to note that al-Nawawī, in determining the minimum amount of loss, makes a distinction between fruits and vegetables. According to him, the minimum amount of loss in fruits is one-third, while in the case of vegetables the quantity is irrelevant.[74]

4.5 The legal effect of *jā'iḥa* in a contract of sales

The rules of *jā'iḥa* are primarily applied in a contract for the sale of fruit. In the event of *jā'iḥa*, two legal consequences are discussed quite extensively by the jurists in the light of the quantity of the loss sustained: firstly, the status of the contract, and secondly, the compensation (*ḍamān*) therefrom.

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[73] al-Bājī, *op.cit.*, p. 235.

[74] al-Nawawi, *Kitāb Majmūᶜ*, vol. 12, p. 172.

4.5.1 Status of the contract

According to al-Baghawī, in a contract for the sale of fruits on the tree where the contract is concluded after the sign of ripening is evident, if the whole of the fruit is destroyed by *jā'iḥa*, the contract is terminated. However, if only some portion of the fruits is destroyed, the contract is terminated with regard to the destroyed portion. The status of the contract for the remaining portion is not terminated according to the well known opinion among the Shāfiᶜīs. In this regard, an option is given to the buyer. If he decides to proceed, he has to pay the cost of the remaining fruit.[75]

4.5.2 Compensation (*ḍamān*)

In a contract of sale, *ḍamān* is an important element connected with the destruction of the object of sale. In contracts for the sale of fruit and other crops which are stricken with calamity, the discussion on *ḍamān* primarily refers to the liability of the parties in the contract. Which party is liable for compensation is determined by the amount of loss, the type of goods involved and the time of the destruction.

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[75] al-Shāfiᶜī, *al-Umm*, vol. 3, p. 59; al-Baghawī, *op.cit.*, p. 392.

With regard to a contract for the sale of fruits, if the destruction occurs before the seller relinquishes ownership of the goods, he is liable for *ḍamān*. If, however, the destruction occurs after the seller relinquishes his ownership, there are two opinions among jurists:

a) According to Abū Ḥanīfa and al-Shāfiᶜī in his later opinion, the buyer is liable for *ḍamān*. The reason is that relinquishing ownership is considered to be delivery of the goods. As such, this situation is tantamount to the destruction of the object after having taken possession.

b) According to his early view, al-Shāfiᶜī regards the seller as liable for *ḍamān*. He bases his opinion on the authority of the *ḥadīth* from Jābir on *jā'iḥa*. He argues that relinquishing the ownership of the object does not terminate the relation between buyer and seller because responsibility for watering the tree is still on the seller until the fruits start to ripen.[76]

With regards to the amount of loss, in the case of fruit, if the amount is one-third or more, the seller is liable for the amount of the loss. If, however, the amount of loss is less than one-third, liability for loss is on the buyer.[77]

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[76] al-Baghawī, *op.cit.*, pp. 392-393.

[77] Mālik, *al-Mudawwana al-Kubrā*, vol. 5, p. 25; Ibn ᶜAbd al-Barr, *op.cit.*, p. 334.

It should also be noted that according al-Shāfiᶜī's earlier view, if someone buys fruits on the tree which are later stricken with a calamity due to the water supply being cut off, the buyer should be given an option either to take the fruit or return the rotten portion, with payment adjusted accordingly.[78]

4.6 The legal effect of *jā'iḥa* in other nominate contracts

In general, the rules of *jā'iḥa* are applicable to contracts for the sale of fruit. This is because the explicit meaning of the *ḥadīths* on *jā'iḥa* indicates that these rules are prescribed for the sale of fruit. However, jurists have widened the application of the rules to other nominate contracts of sale and leasing.

4.6.1 *Waḍᶜ al-jawā'iḥ* in the contract of leasing

As mentioned before, the fundamental rules of *jā'iḥa* are applicable in sales contracts. The Ḥanafīs, in spite of their disagreement on the application of the rules of *jā'iḥa* in the sales contracts, have recognised the rules in the

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[78] al-Shāfiᶜī, *al-Umm*, vol. 3, p. 60.

contract of leasing.[79] However, the application of the rules is still connected with the idea of selling fruits before their good condition is evident. For example, if someone hires land for cultivation, and it is subsequently struck by *jā'iḥa*, this case is considered as *jā'iḥa* on fruit.[80]

The basis for the application of the rules to the contract of leasing is the stipulation that in the contract of sales, compensation is given to the buyer if the goods have been destroyed before he takes possession. By analogy, the same reason is applicable to the contract of leasing as the benefits of leasing have been destroyed before the benefit of the contract can be enjoyed. [81]

4.6.2 *Waḍ al-jawā'iḥ* in the contract of hire (*ijāra*)

There is no dispute among the jurists that a contract of hire is terminated if the benefit of hiring is annulled. In the case of hiring, the object of the contract is benefit. Taking possession in this case means enjoying the benefit of the object being hired. If the benefit does not exist any more, it is analogous to the goods being destroyed before possession has been taken. The benefit

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[79] al-Zuḥaylī, *al-Fiqh al-Islāmī,* vol. 9, p. 271.

[80] Ibn Taimiyya, *op.cit.*, p. 259.

[81] Ibn Taimiyya, *op.cit.*, p. 260; Ibn Qayyim, *I'lām al-Muwaqqi'īn*, vol. 2, p. 338-339.

of hiring can thus be abandoned in two ways; firstly, when the object of hire is destroyed such as in the case of the death of a slave, or the death of an animal; and secondly, when the benefit of hiring cannot be enjoyed any more as the object of hire has been destroyed, such as when a house for rent is ruined, or land being rented for cultivation is flooded or struck by drought.[82]

4.6.3 *Waḍ^{c} al-jawā'iḥ* in the contract of sharecropping

In the contract of sharecropping, the worker has an option where the loss sustained in a case of *jā'iḥa* is one-third or more but less than two-thirds of the value. He is allowed to proceed if he wishes or not . If the loss is less than one-third, he has to continue to work on the land.[83]

4.6.4 *Waḍ^{c} al-jawā'iḥ* in the contract for the renting of real estate (*kirā'*)

According to Mālik, by analogy and interpretation of the rules of *jā'iḥa*, a contract for the renting of real estate is also included in the scope of the rules of *jā'iḥa* if a calamity occurs to the property. He illustrates the situation thus:

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[82] Ibn Taimiyya, *op.cit.*, vol. 30, pp. 288-289.

[83] Mālik, *al-Mudawwana al-Kubrā*, vol. 5, p. 38; al-Dirdīr, *op.cit.*, p. 89; Ibn Rushd, *al-Bayān wa -l-Taḥṣīl*, vol. 12, p. 164.

if someone rents a house for a period of one year and the house is consumed by fire after only one month of the tenure, or the house is ruined, then the payment of the rent is made in accordance with the duration for which the house was occupied.[84]

Conclusion

In the light of the above discussion, it can be said that the fundamental basis of the rules of *jā'iḥa* is related to the sale of fruit. This is made clear in sales contracts, where the rules are applied directly from *ḥadīths* of the Prophet. In the contract of leasing, the object is land being hired for cultivation, but the main issue regarding which the rules are stipulated pertains to fruit which has been spoiled by *jā'iḥa*. The contract of sharecropping takes a similar approach to what is adopted where the main object of *jā'iḥa* is fruits. However, in the contract of hire and the renting of real estate, the jurists have used analogy in order to arrive at a solution for the problem.

The very nature of the cause of *jā'iḥa* which is primarily from *āfa samāwiyya*, is a fundamental element behind the theory of *ḥawādith ṭāri'a*. Therefore, it may be concluded that *jā'iḥa* is a classical concept which

[84] Mālik, *al-Mudawwana al-Kubrā*, vol. 5, p. 29.

applies to the arising of unexpected circumstances in a contract for the sale of fruit and is the most reliable source for the theory of *ḥawādith ṭāri'a* to be applied in modern areas of commercial transactions.

CHAPTER V

THE SALE OF FRUIT BEFORE ITS GOOD CONDITION IS EVIDENT

5.0 Introduction

In chapter four, we looked in depth at the concept of *waḍ^{c} al-jawā'iḥ* which forms a fundamental source for the theory of *ḥawādith ṭāri'a*. Another major issue which needs to be discussed comprehensively in relation to *waḍ^{c} al-jawā'iḥ* is the sale of fruit before its good condition is evident (*bay^{c} al-thimār qabla an yabduwa ṣalāḥuhā*). It has been treated quite extensively by jurists because such sales took place during the time of the Prophet and gave rise to many problems among the people. Accordingly, many *ḥadīth* have been reported which establish the prohibition of this type of sale, along with considering connected legal matters and the solution thereof. A thorough look at the prohibition of the sale of fruit before its good condition is evident is indispensable at this juncture because of its connection with *waḍ^{c} al-jawā'iḥ*. In addition, the rules of *jā'iḥa* are to a large extent derived from

ḥadīths on this matter. Indeed, we should note that the issue of selling fruit before its good condition is evident and *waḍ^{c} al-jawā'iḥ* are interrelated matters in the domain of commercial transactions.

5.1 *Ḥadīths* on the sale of fruit and *waḍ^{c} al-jawā'iḥ* - a link

As noted above, *ḥadīths* on the sale of fruit before its good condition is evident and *ḥadīths* on *waḍ^{c} al-jawā'iḥ* are inter related. It is interesting to note that *ḥadīths* on these two subjects are used interchangeably. For example, there are several *ḥadīths* that link the sale of fruit to *waḍ^{c} al-jawā'iḥ*. Two of them are as follows:

> "It is narrated from Zayd ibn Thābit that people used to trade in dates in the lifetime of the Prophet. When they cut their dates and the purchasers came to receive their rights, the sellers would say, "My dates have got rotten; and are blighted with disease, and are afflicted with *quthām* [a disease which causes the fruit to fall before ripening]." They kept on complaining of defects in their purchases. The Prophet said: "Do not sell dates before their ripeness is evident," advising them as they were quarrelling too much."[1]

In another *ḥadīth*;

> "It is related from Mālik from Abū al-Rijāl Muḥammad ibn ^{c}Abd al-Raḥmān who heard his mother, ^{c}Amra bint ^{c}Abd al-Raḥmān

[1] al-^{c}Asqalānī, *Fath al-Bārī bi Sharḥ Ṣaḥīḥ al-Bukhārī*, vol. 4, pp. 313-314; Abū Dawūd, *Sunan Abū Dawūd*, vol. 3, p. 345.

saying that a man bought the fruit of an enclosed orchard in the time of Messenger of Allāh and he tended it while staying on the land. It became clear to him that there was going to be some loss. He asked the owner of the orchard to reduce the price for him or to revoke the sale, but the owner made an oath not to do so. The mother of the buyer went to the Messenger of Allāh and told him about it. The Messenger of Allāh said, "By his oath, he has sworn not to do good." The owner of the orchard heard about it and went to the Messenger of Allah and said, "O Messenger of Allāh, the choice is his."[2]

It should be noted that *ḥadīths* on the sale of fruit before its good condition is evident and *ḥadīths* on *waḍ' al-jawā'iḥ* are reported together. Nevertheless, these two subjects are discussed as two different topics by the early jurists. The reason is that, in *waḍ' al-jawā'iḥ*, the focus is on the nature of tha calamity, its cause, the losses incurred and the compensation thereof. With regard to the sale of fruit before its good condition is evident, however, emphasis is given to the fruit itself including its types, the signs of its being in good condition, the correct time of its selling and other legal matters attached to the sale.

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[2] Mālik, *al-Muwaṭṭa'*, p.400.

5.2 The legal basis of the prohibition of the sale of fruit before its good condition is evident

The legal basis for the sale of fruit before its good condition is evident comes from *ḥadīths* of the Prophet. Such a sale is in fact one type of transaction prohibited by the Prophet. The reasons for the prohibition are the existence of the element of uncertainty in the transaction. There are many *ḥadīths* of the Prophet regarding this type of transaction, including the following:

a) It was reported from the Prophet that he forbade the sales of years ahead (*bayᶜ al-sinīn*) and the sales of *al-muᶜāwama*.[3]

b) ᶜAbd Allāh ibn ᶜUmar narrated that the Prophet forbade the sale of fruit until its good condition was evident. He forbade it both to the seller and the buyer.

c) Jābir narrated from ᶜAbd Allāh ibn ᶜUmar that the Prophet forbade the sale of fruit unless it had ripened (*yaṭība*).

d) Jābir ibn ᶜAbd Allāh narrated that the Prophet forbade the sale of fruit until it becomes mellow (*tushakkiḥu*).

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[3] *Bayᶜ al-Sinīn* is the sale of dates for a period of more than one year in one contract. *Bayᶜ al-Muᶜāwama* is the sale of trees for many years in one contract.

The prohibition is made primarily on the basis of the avoidance of uncertainty, and follows from the prohibition of sales where the element of *gharar* occurs.[4] The sale of fruit before its good condition is evident is included under *gharar* because the condition of the fruit in the future is unknown. According to al-Qurṭubī, *gharar* in sales contracts due to ignorance may occur in a variety of ways. It could happen due to ignorance of the terms of the contract or ignorance of the price of the goods. It could also occur due to ignorance of the existence of the goods or being incapable of delivering the goods.[5] With regard to the sale of fruit, uncertainty regarding the good condition of the fruit in the future is included in the meaning of ignorance by al-Qurṭubī.

Despite the fact that there are many *ḥadīths* on the prohibition of selling fruit before its good condition is evident, there are also jurists who are inclined to allow this kind of sale. It is reported that ᶜUmar ibn al-Khaṭṭāb and Ibn al-Zubāyr were of the opinion that the sale of fruit of years ahead is permissible.[6]

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[4] al-Zurqānī, *Sharḥ al-Zurqānī*, vol. 3, pp. 396-397.

[5] Ibn Rushd, *Bidāyat al-Mujtahid*, vol. 2, p. 148.

[6] Ibn Rushd, *Bidāyat al-Mujtahid,* vol. 2, p. 149.

In the light of the various *ḥadīths* pertaining to the sale of fruit, the jurists have derived rules regarding the matter. Generally, the discussion of the sale of fruit before its good condition is evident can be divided into two parts:

1) the sale of fruit on the tree
2) the sale of fruit after it has has been picked

5.2.1 The sale of fruit on the tree

The sale of fruit on the tree and the sale of crops while still in the ground are divided into two sections, namely: the sale of fruit before its existence and the sale of fruit after it has come into existence.

i) The sale of fruit before its existence

There is consensus among the jurists that the sale of fruit before its existence is prohibited. According to them this rule is based on the prohibition of selling things before their existence (*an-nahy ᶜan bayᶜ mā lam yukhlaq*) and the prohibition of selling years ahead and *bayᶜ al-muᶜāwama*.[7] The Prophet forbade sales of years ahead and *bayᶜ al-muᶜāwama* because

[7] al-Zuḥaylī, *al-Fiqh al-Islāmī*, vol. 4, p. 485.

these are both the sale of something which is not yet in existence. This kind of sale is tantamount to sales with an aspect of uncertainty, or *bayᶜ gharar.*

ii) The sale of fruit after it has come into existence

The majority of jurists are of the opinion that the sale of fruit after its existence is permissible even though it has not been harvested. Abū Salama ibn ᶜAbd al-Raḥmān and ᶜIkrima, however, hold the opinion that such sales are not permissible until the fruit has been picked or harvested.[8] The sale of fruit before it is harvested could be carried out in many ways. It could be completed before or after the fruit has ripened. The sale itself might be unconditional or could stipulate the picking of the fruit or retention of the fruit on the tree. Regarding the sale of fruit before or after it has ripened, with or without any conditions, there are several issues that should be considered.

a) The sale of fruit before it has ripened

Such a sale is permissible if the contract includes the picking of the fruit as a condition, and if the picking is done immediately after the completion of the contract. This is the opinion held by the majority of

jurists except al-Thawrī and Ibn Abī Lāylā who did not permit it. According to al-Nawawī, a sale with the condition of picking (the fruit) is permissible if picking brings good to the fruit, such as in the case of green sour grapes (*ḥiṣrim*), almonds (*lawz*), dates (*balaḥ*) and apricots (*mishmish*). If there is no advantage to the fruit by picking it, such as with walnuts (*jawz*), quinces (*safarjal*) and pears (*kummathrā*), sales with the condition of picking are not permissible.[9]

The sale of fruit before it has ripened is also permissible if the sale is absolute, i.e. without any conditions, according to the Ḥanafīs. By contrast, however, the Shāfiᶜīs, Mālikīs, Ḥanbalīs, Isḥāq, al-Layth and al-Thawrī are of the opinion that such a sale is not permissible. The majority mainly adduce two reasons: firstly, there are many *ḥadīths* on the prohibition of selling fruit before its good condition is evident. The prohibition is due to the danger of the fruit being spoilt by *jā'iḥa*. Secondly, it is due to the fact that the condition of the fruit remaining unpicked is not explicitly stated in the contract. According to them, since the contract is initially free from any conditions, it implies the restriction that the fruit should remain on the tree. Such an implicit restriction is not permissible, particularly when that

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[8] Ibn Rushd, *Bidāyat al-Mujtahid*, vol. 2, p. 149.

[9] al-Nawawī, *Majmūᶜ*, vol. 2, p. 120.

restriction makes the contract null and void.[10] Al-Nawawī, commenting on the prohibition of this sale, says that it is a normal practice in buying fruit that the fruit remains on the tree until the harvesting season. If buying is done before the fruit's good condition is evident, there is no guarantee that it will be free from blight at the time of picking. Therefore, this sale is tantamount to a *gharar* sale because of the uncertainty of the future of the fruit.[11] According to Abū Ḥanīfa, such a sale is permissible on the grounds that the buyer picks the fruit immediately after the completion of the contract.[12] The Ḥanafīs also say that the sale is permissible because the goods are beneficial property (*māl muntafiᶜ*). Even if the goods are not beneficial to human beings, they can be used to feed animals if the fruits are spoilt by *jā'iḥa*.[13]

The sale of fruit before it has ripened may also be allowed on condition that the fruit remains in the seller's custody. Jurists from the Ḥanafī school are unanimously agreed that this contract is void because the contract cannot be executed with that condition in force. According to them, the condition brings an advantage to one of the parties in the contract, that is the purchaser. For instance, if someone buys corn or wheat on the condition that

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[10] Ibn Rushd, *Bidāyat al-Mujtahid*, vol. 2, pp. 149-150.

[11] al-Nawawī, *Majmūᶜ*, vol. 2, p. 114.

[12] Ibn Rushd, *Bidāyat al-Mujtahid*, vol. 2, p. 149.

[13] al-Zuḥaylī, *al-Fiqh al-Islāmī*, vol. 4, p. 485.

the corn or wheat is left in the house or on the land of the seller, the goods cannot be left in the seller's custody unless the house or land of the seller is borrowed. Therefore, the condition that stipulates the leaving of the fruit in the seller's custody becomes part of the conditions for borrowing (*al-iʿāra*). This kind of transaction is called a deal within a deal (*ṣafqa fī ṣafqa*) and is absolutely prohibited. The sale is also exposed to *gharar* as the buyer does not know whether the goods will remain intact or be blighted by *jā'iḥa*.[14] Therefore, the reasons for the prohibition of this kind of sale could be summarised as follows:

a) the existence of elements of *gharar*

b) that the condition stipulated is itself null and void

c) that this is a deal within a deal.

b) The sale of fruit after it has ripened

In general, there is no dispute among the jurists about the permissibility of the sale of fruit after it has ripened. The majority hold that the reason for this permissibility is that disease normally occurs in fruit before it begins to ripen. After ripening its incidence is very rare.[15] This permissibility includes

[14] al-Zuḥaylī, *al-Fiqh al-Islāmī*, vol. 4, p. 486.

[15] Ibn Rushd, *Bidāyat al-Mujtahid*, vol. 2, pp. 150-151.

both contracts of sale with the condition of picking and contracts of sale without conditions.

However, if the contract includes a condition stipulating that the fruit be left on the trees, there are several opinions among the jurists. The sale is not permissible according to the Ḥanafīs. Their argument is that the general meaning of *ḥadīth* on the permissibility of this sale implies picking. Stipulating the condition of leaving the fruit on the trees is against the general meaning of the *ḥadīth* and is therefore not permissible. They also argue that the selling of the things themselves requires immediate delivery, otherwise it involves *gharar*.[16]

Even though the majority agree that such a sale is permissible, they are unanimous that the contract is null and void if the fruit does not maintain its good condition. However, Abū Ḥanīfa and Abū Yūsuf are of the opinion that the sale is null and void even if the fruit does maintain its good condition. Their argument is that the buyer gains some benefit from the contract to which he is not entitled.[17] This line of argument is thus similar to that of buying fruit before its good condition is evident on the condition that the fruit is left with the seller.

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[16] Ibn Rushd, *Bidāyat al-Mujtahid*, vol. 2, p. 151.

[17] al-Zuḥaylī, *al-Fiqh al-Islāmī*, vol. 4, p. 487.

It is interesting to note that al-Nawawī goes into more detail on this particular type of sale. He makes a distinction between the sale of fruit when it starts to ripen and the sale of fruit after it has ripened. He says, if the sale is concluded when the fruit starts ripening, the sale is permissible with condition that the fruit being picked, in accordance to the *ḥadīth* from Ibn ᶜUmar to the effect that the Prophet forbade the sale of fruit until it begins to ripen. He also argues that if a sale of fruit before it has ripened with the condition of picking is permissible, this sale is more deserving. Furthermore, the fruit is certainly free from any blight. In the case of a sale being concluded after the fruit has ripened, al-Nawawī is of the opinion that the sale is absolutely permissible, whether the sale is with the condition of picking or stipulates that the fruit is left in the seller's custody or is without any conditions whatsoever.[18]

5.2.2 The sale of fruit after picking

There is no dispute among jurists that the sale of fruit after picking or harvesting is permissible.[19] Such a sale is permitted whether the fruit has ripened or not. The reason is that the fruit is free from any blight.

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[18] al-Nawawī, *Majmūᶜ*, vol. 2, p. 144.

[19] Ibn Rushd, *Bidāyat al-Mujtahid*, vol. 2 p. 149; al-Qurṭubī, *al-Kāfī*, p.332; al-Sharbīnī, *Mughnī al-Muḥtāj*, vol. 2, p. 496; al-Zurqānī, *Sharḥ al-Zurqānī*, vol. 3, p. 335; al-Nawawī, *Majmūᶜ*, vol. 2, p. 144; al-Zuḥaylī, *al-Fiqh al-Islāmī*, vol. 4, p. 486.

5.3 The appearance of good condition (*budūw al-ṣalāḥ*)

Generally speaking, the jurists are of the opinion that the sale of fruit or crops is prohibited unless the signs of good condition (*budūw al-ṣalāḥ*) are evident. Good condition indicates that the fruit has ripened and is free from *jā'iḥa*. However, they are in disagreement on the interpretation of the signs of good condition.

The signs of good condition are illustrated by the Prophet in many *ḥadīths*. Among the verbs used are *ṭāba,*[20] *shakkaḥa*[21] and *azhā.*[22] According to the Mālikīs,[23] good condition is indicated by the change of the colour of the fruit to yellow in the case of dates, or red in the case of figs. Grapes change to black, if they are of the type that turn black.[24] This

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[20] al-Nawāwī, *Ṣaḥīḥ Muslim*, vol. 10, p. 180. The *ḥadīth* reads: "*Nahā al-Nabiy ᶜan bayᶜ al-thamar ḥattā yaṭība.*"

[21] al-ᶜAsqalānī, *Fatḥ al-Bārī bi Sharḥ Ṣaḥīḥ al-Bukhārī*, vol. 4, p. 315. The *ḥadīth* reads: "*Nahā al-Nabiy 'an tubāᶜ al-thamara ḥattā tushakkaha*". See also Ibn Mājah, *Sunan Ibn Mājah*, vol. 2, p. 746.

[22] al-ᶜAsqalānī, *Fatḥ al-Bārī bi Sharḥ Ṣaḥīḥ al-Bukhārī*, vol. 4, p. 315. The *ḥadīth* reads: "'*an Rasūl Allāh nahā 'an tubaᶜ thamarat al-nakhl ḥattā tazhua*". See also al-Laythī, *Muwaṭṭa'*, p. 398; al-Nawawī, *Ṣaḥīḥ Muslim bi Sharḥ al-Nawawī*, vol. 10, p. 217; al-Zurqānī, *Sharḥ al-Zurqānī*, vol. 3, p. 335.

[23] al-Zurqānī, *Sharḥ al-Zurqānī*, vol. 3, pp. 335-336; al-Qurṭubī, *al-Kāfī*, p. 332.

[24] Ibn Rushd, *Bidāyat al-Mujtahid*, vol. 2, p. 151.

opinion is shared by the Shāfiᶜīs[25] and the Hanbalīs.[26] Apart from the change of colour, good condition is also indicated by the ripeness or sweetness of the fruit.[27]

The foundation of the opinion of the majority is based on the saying of the Prophet, which is related by Mālik from Ḥumayd from Anas, that "He (the Prophet) was asked about his words 'until it ripens' and he said, 'Until it turns red'." It is also narrated from the Prophet that "He forbade the sale of grapes until they turn black, and grain until it hardens."[28] However, the Ḥanafīs have a different interpretation of the signs of good condition. According to them, fruit and agricultural products show the signs of good condition when they are free from blight.[29] Based on their opinion, once they are free from blight, fruit and agricultural products may be sold, even before they show signs of ripeness or sweetness. Their opinion has its foundation in the saying of the

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[25] al-Shāfiᶜī, *al-Umm*, vol. 3, p. 47; al-Shirāzī, *al-Muhadhdhab*, vol. I, p. 281.

[26] Ibn Qudāma, *al-Mughnī*, vol. 4, p. 92.

[27] al-Zuḥaylī, *al-Fiqh al-Islāmī*, vol. 4, p. 490; Sayyid Sābiq, *Fiqh al-Sunna*, vol. 3, p. 206; Maḥmaṣṣānī, *al-Naẓariyya al-ᶜĀmma*, vol. 2, p. 329.

[28] Ibn Rushd, *Bidāyat al-Mujtahid*, vol. 2, p. 151.

[29] al-Zuḥaylī, *al-Fiqh al-Islāmī*, vol. 4, p. 491; Maḥmaṣṣānī, *al-Naẓariyya al-ᶜĀmma*, vol. 2, p. 329.

Prophet, narrated from Ibn ᶜUmar, to the effect that he forbade the sale of fruits until they were safe from disease.[30]

Good condition is also indicated by the season. It is narrated from Mālik that Zayd ibn Thābit did not sell his fruit until the rise of the *Thurayya* (Pleiades) and that this took place when twelve nights of *Ayyār*, that is May, had passed. It is also recorded that Ibn ᶜUmar was asked about the saying of the Prophet regarding the prohibition of selling fruits until they were safe from disease and he said, "That is the time of the ascension of the Pleiades." There is another report from Abū Hurāyra that the Prophet said, "When the star ascends in the morning, diseases are removed from the residents of the land."[31]

From the opinions of the jurists regarding the signs of good condition as a foundation for the permissibility of selling, three conclusions may safely be drawn:

(a) the signs of good condition begin to appear when the fruit is ripening,

(b) good condition is also indicated by the rise of the Pleiades, even if at the time of sale the fruit has not yet ripened, and

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[30] Ibn Rushd, *Bidāyat al-Mujtahid*, vol. 2, p. 151.

[31] Ibn Rushd, *Bidāyat al-Mujtahid*, vol. 2, p. 151.

(c) the combination of both together is a strong indication of good condition.[32]

5.4 The selling of fruit that ripens at different stages

Discussion of this matter is rather complex as there are at least three interrelated issues involved, namely, the sale of fruits of different species that are ripening in a single orchard, the sale of fruits of the same species that ripen at different stages in one orchard, and the sale of fruits of one or more species from more than one orchard.

The Mālikīs' view on this matter is that when there are fruits of different species with different stages of ripening in a single orchard, no species is to be sold until ripening has commenced in that species.[33] In the case of fruits that ripen in different stages, Mālik asserts that the commencement of ripening in one species of fruit is the start of ripening in parts of the crop, not necessarily in the whole of it. That is to say, if parts of the crop have ripened, all of the crop can be sold, as the process of ripening comes successively. The reason

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[32] In this regard, al-Māwardī has divided the signs of good condition into eight forms: (a) the change of colour, like yellow and red for dates, black for grapes, etc, (b) the taste or flavour as with the sweetness of sugar cane; (c) the ripeness of figs and water melons; (d) the strength of the crops as with wheat and barley; (e) the length and fullness, as with hay and vegetables; (f) large size as with wild cucumber; (g) the splitting of the husk as with cotton and walnut; and (h) the evidence of blossom as with rose and mulberry.

behind his view is that the time when the fruit is generally secure from disease is the commencement of ripening in succession without interruption. He also stresses that if ripening has begun in the dates in one orchard, it is permitted to sell both those and the dates from the orchards nearby, provided that the dates of the orchards nearby are of the same species.[34]

For the Ḥanafīs, the commencement of ripening is judged by the ripening of each species or the whole species.[35] They stress that the sale of fruit which has already ripened but is in the early stages is permissible. However, the sale of fruit which has only partly ripened, when the other part has not, is not permissible because there are elements of both certainty and uncertainty (*al-maᶜlūm wa- l-majhūl*) in the contract.[36]

According to the most authoritative view of the Shāfiᶜīs and Ḥanbalīs, the commencement of ripening is determined individually for each species of fruit and is limited to the fruit in the same orchard only. Therefore, according to them, the selling of pomegranates (*rummān*) is not permissible if

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[33] Ibn Rushd, *Bidāyat al-Mujtahid,* vol. 2, p. 152.

[34] al-Qurṭubī, *al-Kāfī*, p. 332; Ibn Rushd, *Bidāyat al-Mujtahid*, vol. 2, p. 152; al-Zuḥaylī, *al-Fiqh al-Islāmī*, vol. 4, p. 491.

[35] al-Zuḥaylī, *al-Fiqh al-Islāmī*, vol. 4, p. 491.

[36] al-Zuḥaylī, *al-Fiqh al-Islāmī,* vol. 4, p. 492.

the dates have started to ripen and the selling of dates in one orchard is not permissible if the dates in a nearby orchard have started to ripen. They go further and state that species do not follow others in their times of ripening and the commencement of ripening of different orchards is subject to their geographical location.[37] Al-Shāfiᶜī bases his view on the assumption that the fruit does not really exist at the time of the conclusion of such a contract. If it has not ripened, it is the sale of something which has not yet come into existence.

On this issue, al-Shirbinī, in his work *al-Mughnī*, provides another opinion of the Shāfiᶜīs that the sale of the produce of whole trees (fruits) or trees from one species is permissible even if only one fruit has started to ripen. He bases his opinion on the grounds that fruits do not ripen altogether at one time. If ripening of all of the fruits is a condition for selling, transactions become impossible because the earlier fruits will have deteriorated. Furthermore, the selling of one fruit after another is difficult for both parties. In the case of fruits of different species like dates and *ruṭab*, if one of them has ripened, the transaction of the other one becomes

[37] al-Zuḥaylī, *al-Fiqh al-Islāmī*, vol. 4, p. 491.

permissible. However, the validity of the transaction is subject to the condition that the fruit is being picked.[38]

The variety of opinions among the jurists on this issue is due to the fact that they are in disagreement regarding the determination of the certainty of the ripeness of the fruit. As ripeness is the dividing line between fruit that is safe or unsafe from blight, certainty regarding ripeness is crucial. Permissibility of a sale is therefore subject to the certainty of ripeness where the fruit is free from blight.

Conclusion

The correct performance of the sale of fruit before its ripeness is evident entails the application of a significant body of legal rulings as far as commercial transactions are concerned. The legality of the sale is determined by several factors which include the time of the fruit being sold, i.e. before or after the fruit has ripened, the extent of ripeness of the fruit and other matters. Furthermore, the discussion of this type of sale is important due to

[38] al-Sharbīnī, *Mughnī al-Muḥtāj*, vol. 2, pp. 500-501; See also al-Nawawī, *Majmūᶜ*, vol. 2, p. 158. al-Shāfiᶜī, in his view on this particular subject has said: "If part of the fruit has started to ripen, the sale of the fruit is permissible because Allāh has created it in such a way that the fruit does not ripen all at the same time to show His kindness to His slave. If all the fruit were to ripen at the same time, it would be very difficult to pick all the fruit, thus He makes the fruits ripen gradually. If ripeness is made a condition for every fruit in

its relation with *waḍ' al-jawā'iḥ* to the extent that fruit is the initial subject matter in both cases. Therefore, the conclusion can be drawn that the main reason for the prohibition of this type of sale is the uncertainty of the condition of the fruit in the future, since it may be spoilt by blight.

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a sale it brings difficulty." Al-Shāfiʿī quotes a verse from the Qur'ān: "He has imposed no difficulties on you in religion." (*al-Ḥajj* : 78)

CHAPTER VI

DOCTRINE OF *ᶜUDHR* IN *ḤAWĀDITH ṬĀRI'A*

6.0 Introduction

In the *shāriᶜa*, the sanctity of contracts is a principle of paramount importance. The authority for this is derived from the Qur'ān[1] and the traditions of the Prophet.[2] According to Ibn Taimiyya, God has commanded that contracts should be fulfilled and this is of general application.[3] However, inevitably, there are exceptional circumstances where the *sharīᶜa* recognises the injustice which would arise from strict enforcement of contractual terms. The doctrine of *waḍᶜ al-jawā'iḥ* in the view of Muslim jurist, like Mālik and Aḥmad is based on the rules of necessity, fairness and equity, and thus can be seen as the foundation for the theory of *ḥawādith ṭāri'a*. Even though the Ḥanafī school does not recognise the doctrine of

[1] This is evident in the verse which reads: "O ye who believe! Fulfil (all) obligations." See Q., *al-Māida*:1.

[2] The Prophet said: "Every agreement is lawful among the Muslims except one which declares forbidden what is allowed or declares allowed what is forbidden and Muslims are bound by all the conditions they make except those which forbid what is allowed or allow what is forbidden." This *ḥadīth* is related by al-Tirmidhī.

[3] Ibn. Taimiyya, *op.cit.*, vol. 3, p. 467.

waḍ^{c} al-jawā'iḥ, the doctrine of *^{c}udhr* (excuse) is widely applicable in contracts of leasing and hire and stipulates that the cancellation of the contract is allowed if the circumstances have changed, indicating that the principle is acceptable in the school. This chapter seeks to examine the doctrine of *^{c}udhr* in the Ḥanafī school in particular and the other schools in general.

6.1 *^{c}Udhr* in the Ḥanafī school

The application of the doctrine of *^{c}udhr* in commercial transactions is widely practised in the Ḥanafī school, especially in contracts of leasing, hire and the fluctuation of currency,[4] though there seems to be a disagreement among the schools with regard to the application of the doctrine: while the Ḥanafī school practises the theory widely, the other schools limit its application to within the narrowest possible boundaries.[5]

Basically, the idea concerning events that constitute *^{c}udhr* in the Ḥanafī school is not to establish the rules regarding unexpected events. It

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[4] al-Kāsānī, *op.cit.*, vol. 4, pp. 197-201.

[5] The application of the theory of *^{c}udhr* is accepted in the Mālikī, Shāfi^{c}i and Ḥanbalī schools in the contract of leasing only. The Ḥanbalī school requires that an event be of a general nature. Therefore, cases where the events are related only to one of the parties in the contract such as bankruptcy, may not be relied on to invoke the theory.

is primarily related to the issue of the parties in the contract who undergo a hardship due to something unexpected happening during the contract. Therefore, the solution for the hardship arising from an event which is beyond their control is the dissolution of the contract due to *ᶜudhr*.[6]

It is interesting to note that the doctrine is compared to the termination of a sales contract on the grounds of a defect as stated by al-Sarakhsī:

> "According to al-Shāfiᶜī, if a contract of leasing is absolute, it becomes binding like a contract of sales. We are of the opinion that a contract of leasing is terminated due to *ᶜudhr*. On the contrary, al-Shāfiᶜī says that a contract of leasing is not terminated except by defect. He (al-Shāfiᶜī) is of the opinion that, legally, a benefit is similar to an existing thing. Thus, a contract for possession of a benefit is similar to a contract for possession of an existing thing. A contract of sales is not terminated except for reason of defect; therefore, a contract of leasing is terminated for the same reason. We are of the opinion that a contract of leasing is permissible for necessity, and in its application it gives benefit to the contracting parties. When an event that brings damage to the contract occurs, we exercise an analogy. If the termination of a contract because of defect is to avoid injury to the party, then, for the same reason, if injury occurs which prevents performance of a contract, it is *ᶜudhr*. Accordingly, termination of contract is permissible."[7]

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[6] al-Sarakhsī, *al-Mabsūṭ*, Beirut, 1406H/1986M, vol. 15, p. 79; al-Sanhūrī, *Maṣādir al-Ḥaqq*, vol. 6, p. 95.

[7] al-Sarakhsī, *ibid.*, vol. 16, p. 2.

It is correct to claim that in the Ḥanafī school the circumstance which may invoke the theory of *ḥawādith ṭāri'a* is *ᶜudhr*. This is because *ᶜudhr* is defined in the Ḥanafī school as an event the occurrence of which creates, within the performance of the contract itself, an extra-contractual situation.[8] In other words, it refers to the arising of a new situation which destroys the expectations of the parties and cannot be resolved without causing a loss or damage to one of the contracting parties. Al- Kāsānī summarises the logic of adopting *ᶜudhr* by saying that:

> "If a contract in an event of *ᶜudhr* was still considered binding, unwarranted harm which was not envisaged in the contract would be inflicted by one of the parties."[9]

It should be noted that in its application, the element of changed circumstances is vital in order to invoke the doctrine of *ᶜudhr* and, consequently, provides a ground for dissolution of the contract. It should also be noted that it is sufficient that the circumstances which motivate the contract have materially changed after the conclusion of the contract in order for the doctrine of *ᶜudhr* to be invoked.

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[8] Ibn ᶜĀbidīn, *Ḥāshiyya ibn ᶜĀbidīn*, vol. 6, p. 76; al-Kāsānī, *op.cit.*, vol. 4, p. 222.

[9] al-Kāsānī, *op.cit.*, vol. 4, p. 222.

As discussed above, *ᶜudhr* is an event which does not occur during the conclusion of the contract but occurs unexpectedly after the completion of the contract. As a result, any hardship or circumstances which spoil the expectations of the parties would be considered as *ᶜudhr*, such as the illness of a lessee or a lessor. According to the Ḥanafīs, the mere intention of the lessee to change his job from agricultural work to trading may constitute *ᶜudhr*.[10]

Al-Kāsānī, in support of his view that a contract of leasing is terminated by *ᶜudhr* says that *ᶜudhr* constitutes a reason for dissolution because, if the parties knew about the event in advance, they would not have got into the contract from the beginning. The assumption is drawn from the contract of sale where the buyer is given an option to cancel the contract if there is a defect in the goods. He stresses that if a man who suffers a toothache hires a dentist to pull out the tooth and then suddenly the pain ceases, or a man who suffers a pain in his hand calls for a surgeon to cut off the hand and subsequently the pain disappears, were compelled to proceed with the contracts, this would be unacceptable logically and legally (*ᶜaqlan wa sharᶜan*).[11]

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[10] al-Zuḥaylī, *Naẓariyyāt al-Ḍarūra al-Sharᶜiya*, p. 321; al-Sanhurī, *Maṣādir al-Ḥaqq*, vol. 6, p. 91.

[11] al-Kāsānī, *op.cit.*, vol. 6, p. 197.

Instead of *ᶜudhr*, Al-Zaylaᶜi, another Ḥanafī jurist, says that the contract of leasing can be terminated by defects. His reason is that a contract requires an exchange safe from any defect, and on this basis he assumes that consent cannot be established if there is a defect in the object of the contract (*al-maᶜqūd ᶜalayh*). In such circumstances, dissolution of the contract is required. For example, in a contract of leasing, the object of the contract is a benefit. If there is a defect to the benefit before the lessee possesses it he should be given an option, similar to the case in the contract of sales.[12] Al-Zaylaᶜī's opinion is not different from the other Ḥanafī jurists. In fact, it is appropriate to conclude that al-Zaylaᶜī goes into the root of the problem by assuming that a defect is another example of the element of *ᶜudhr*.

6.2 Circumstances which invoke *ᶜudhr*

As defined by the Ḥanafī jurists, *ᶜudhr* is an event that bring hardship to the parties engaged in the contract in the performance of what has been stipulated in the contract. In this regard, it seems that any circumstances which have apparently changed from the time of the conclusion of the contract which make the performance of the contract difficult or impossible may constitute *ᶜudhr*. This includes a change in the object of the contract and a change in the circumstances which motivate the contract.

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[12] al-Zaylaᶜī, *Tabyīn al-Ḥaqā'iq*, Cairo, 1313H, vol. 5, p. 143.

a) A change in the object of the contract

A change in the object of the contract is known as *ʿayb* (defect). A defect may constitute *ʿudhr* as stated in the *Majalla*:

> "In a contract of hire, the circumstance which creates an option on account of defect is something which causes complete loss of or interference with the benefits sought to be obtained. Example: A house is entirely destroyed; the utility of a mill is prevented by water being cut off; the frame of a roof of a house sinks; a place is knocked down so as to be unsuitable for habitation; the back of a horse which is hired is injured by galling. In all these cases there is an option for defect, if they are taken on hire, on account of the benefits sought to be obtained being destroyed. But defects which do not interfere with the benefits sought to be obtained give no right to an option for defect in the case of a contract of hire, as where the plaster of a house falls off, but not to such an extent that rain and cold can enter; or where the mane or tail of a horse is cut."[13]

In such circumstances the *Majalla* grants the lessee the right of option of either rescinding the contract or continuing with it:

> "If a defect occurs in the thing hired, the person taking the thing on hire may exercise an option. He may either put the thing hired to the use for which it was hired in spite of the defect, in which case he

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[13] *Majallat al-Aḥkām*, Art. 514. See also Hamilton, *Hedaya*, p. 509.

must pay the whole of the rent, or he may cancel the contract of hire."[14]

The death of one of the contracting parties is also a reason to resort to *ᶜudhr*. A death is considered to be a change in the thing hired, as stated in the *Hedaya*:

> "If one of the contracting parties dies and the hirer had entered into the contract of hire on his own account, the contract is dissolved, because if the contract were still to remain in force, it would follow that the usufruct of rent then becomes the right of a person who was not party to the contract, namely the heir, which is unlawful. Besides, with respect to the lessor, it is the use of his property which forms the subject of the contract, and as in consequence of his decease, this property changes to his heir. It follows that the contract of hire becomes null, because of the subject being lost, for a change in the right of the property is the same as a change in the thing itself."[15]

However, in certain circumstances, a death itself does not necessarily constitute *ᶜudhr* which terminates a contract, as illustrated in the *Majalla*:

> "Likewise, by the death of the person who seeks for a wet nurse, the hiring is not annulled, but by the death of the child or of the milk mother, the hiring is annulled."[16]

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[14] *Majallat al-Aḥkām*, Art. 516.

[15] Hamilton, *op.cit.*, p. 510.

[16] *Majallat al-Aḥkām*, Art. 443.

b) A change in the circumstances which motivate the contract

A contract is dissolved by the occurrence of any sufficient pretext for dissolution. In this event, the circumstances which motivate the contract have changed, thus rendering the performance onerous, or rendering it impossible to carry out without inducing one or other party to hardship.[17]

It is provided in the *Majalla*:

> "When a valid impediment has appeared which is an obstacle to the carrying out of the object of the contract, the hiring is dissolved. For example, when a cook has been hired for a marriage festival, if one of the parties going to be married dies, the contract of hiring is annulled."[18]

The Ḥanafī jurists have outlined a wide variety of circumstances which were not considered by the party at the time the contract was made and which may result in the dissolution of the contract. For example, either party to a contract of hire of premises may revoke the contract due to a change in personal circumstances. The owner, for example, if he incurs a debt which he can pay only if he sells the premises or the tenant, for example, if he becomes bankrupt and leaves the market or changes his

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[17] Hamilton, *op.cit.*, p. 510.

profession. In the same way, a ground for rescission exists where the hiring was for a particular purpose which ceases thereafter. For example, if a person rents a bath-house in a village for a stipulated period of time and then the people of the village migrate to another place, the bath-house may be returned to the owner and there is no obligation to pay the rental.[19]

6.3 Judicial application of *ʿudhr* in commercial transactions

As mentioned earlier, contracts are the law which applies to the parties concerned. The contract cannot be cancelled or amended except by agreement of the parties thereto. Neither of the parties may unilaterally revoke or amend the contract that they have agreed upon. Al-Kāsānī further highlights this principle by saying that:

> "It is related from the Prophet that Muslims should stand by what they have stipulated, and this plainly makes the fulfilment of every stipulation obligatory, except where there is evidence for making a special case; a Muslim cannot be said to stand by a stipulation which he is not obliged to fulfil..."[20]

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[18] *Majallat al-Aḥkām*, Art. 443.

[19] al-Kāsānī, *op.cit.*, vol. 4, p. 297.

[20] al-Kāsānī, *op.cit.*, vol. 4, p.302

However, there is an exception to the above rule, which gives one party or another the power to revoke or amend a contract, as for example, if a trader undertakes to supply a particular commodity, and then a sudden event occurs which makes his obligation oppressive to the point of threatening him with crushing loss beyond all accustomed limits, such as if the price of the commodity were to increase several times from what it was when the contract was concluded.[21]

It is worthy noting a remark made by the contemporary Egyptian jurist, ᶜAbd al-Sattār Ādam, on the view of the classical jurists regarding the doctrine of *ᶜudhr*:

> "In the view of the classical jurists, any excuse (*ᶜudhr*) which makes performance of the purpose of the contract impossible without damage resulting to the contracting party in respect of either his person or his property constitutes a valid reason for rescission of the contract."[22]

There is also a general rule in the *sharīᶜa* which was incorporated in the *Majalla* which says: "hardship begets facility,"[23] and also "damage and

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[21] ᶜAbdul Rasūl ᶜAbdul Redhā, *op.cit.*, p. 62.

[22] Adam, A.S., *al-Sharīᶜa wa- l-Qānūn al-Madanī al-Miṣrī*, Cairo, 1969, p. 47., cited in Coulson, N.J., *Commercial Law in Gulf States*, p. 86.

[23] *Majallat al-Aḥkām*, Art. 17. See also p. 69.

retaliation by damage is not allowed,"[24] and "damage must be removed."[25] Facility means legal mitigation on account of hardship as an exception to the general rule. That is to say that in certain circumstances where people are in difficulty and strict adherence to the law will result in injustice, it becomes necessary to lighten the people's burden and to disregard general rules if their application would result in injury and hardship.[26]

6.4 *ᶜUdhr* in the contract of leasing

A contract of leasing can be revoked if any of the parties, or the object of lease, are in a state of *ᶜudhr*.[27] According to the Ḥanafī jurists, the contract is revoked on account of necessity if the parties in the contract are in hardship (*ᶜudhr*). They point out that if the contract were to remain binding under such circumstances, the debtor would be bound to tolerate a prejudicial situation to which he did not intend to bind himself when he entered into the contract.[28] They have classified the hardship that is

[24] *Majallat al-Aḥkām*, Art. 19. See also p. 70.

[25] *Majallat al-Aḥkām*, Art. 20. See also p. 70.

[26] Maḥmaṣṣānī, *Falsafat al-Tashrīᶜ fī -l-Islām*, pp. 152-153.

[27] al-Sarakhsī, *op.cit.*, vol. 16, p. 2; al-Sanhūrī, *Maṣādir al-Ḥaqq*, vol. 6, p. 91.

[28] Kourides.P.N., *op.cit.* pp. 384-435.

tantamount to the cancellation of the contract into three types, namely, *ᶜudhr* on the lessee, *ᶜudhr* on the lessor and *ᶜudhr* on the things leased.[29]

6.4.1 *ᶜUdhr* on the lessee

The contract of leasing is allowed to be terminated in a situation where the lessee is sick or in a state of bankruptcy or where the lessee wishes to change his job from industrial to agricultural work or from agricultural work to trading.[30] The reason behind the permission to terminate the contract is that those who are in a state of bankruptcy or are changing job have no income and are in a state of difficulty. The contract is also allowed to be terminated if the lessee is travelling to another country. This is due to the fact that compelling a lessee who is travelling for change of work to fulfil his contractual obligations by continuing to pay rent is an onerous contractual obligation which goes against the Islamic principle of justice.[31]

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[29] al-Sanhūrī, *Maṣādir al-Ḥaqq*, vol. 6, p. 91; al-Zuḥaylī, *al-Fiqh al-Islāmī*, vol. 9, p. 272.

[30] al-Sarakhsī, *op.cit.*, vol. 16, p. 4.

[31] al-Zuḥaylī, *Naẓariyyāt al-Ḍarūra al-Syarᶜiya*, p. 321.

6.4.2 *ᶜUdhr* on the lessor

In the Ḥanafī school the lessor is allowed to dispose of the leased property if he becomes so insolvent that he must sell his property, notwithstanding his commitment as lessor, in order to avoid greater damage, e.g. an exorbitant claim resulting in his bankruptcy and imprisonment.[32] In the same way a man who hires a contractor to demolish a house, dig a well or cut a tree will be allowed to terminate the contract of services because demolition, digging and cutting are in their very nature damaging to his property.[33]

6.4.3 *ᶜUdhr* on a thing leased

ᶜUdhr on a thing leased may sometimes relate to the thing hired, such as in the case of a person who hires a public bath in a village for a specific period of time, and then the people of the village migrate en masse to another place, so that he has no business.[34] The same rule also applies if a father hires his son for a job and the son attains puberty during the duration of the

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[32] *Ibid.* p. 322.

[33] Ibn Rushd, *Bidāyat al-Mujtahid*, vol. 2, pp. 140-142.

[34] al-Zuḥaylī, *op. cit.*, p. 322.

job. This is considered to be *ᶜudhr* because to continue with the contract after the age of puberty would cause harm to the boy as he is now eligible to exercise his freedom to enter into a contract whereas before puberty he was not. *ᶜUdhr* is also illustrated in the case of a man who hires a wet nurse to feed his baby but the infant refuses to be fed or the woman falls sick or the family of the infant travels to another place. Under these circumstances the contract is annulled.[35]

There is a provision in the *Majalla* which reads:

> "If a specific animal has been hired to go to such a place and the animal gets sick on the road and stops, the hirer has an option. If he wishes, he waits until the animal gets well, and if wishes he rescinds the hiring, and in that case he pays to the person who gives for hire whatever may be the share of the agreed price for the distance to that place."[36]

Likewise, in a case where the benefit from the thing hired ceases, the hirer does not need to pay the rent.

> "If the benefit from the thing hired ceases to exist, then the rent becomes no longer payable. For example if there is need for the repair of a bath and it remains unused during that time, the share of the hire for that time is not payable. Likewise, if there is an idle

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[35] al-Zuḥaylī, *op.cit.*, p. 322; al-Sanhūrī, *Maṣādir al-Ḥaqq*, vol. 6, p. 92.

[36] *Majallat al-Aḥkām*, Art. 539.

time, consequent on the water of a mill being cut, the rent is considered not to be payable from the time of the cutting of the water."[37]

6.5 Mode of cancellation

A contract of leasing is a binding contract (*lāzim*).[38] Therefore, like any other binding contracts, a cancellation of the contract of leasing due to *ᶜudhr* takes place either by itself or through the decree of a judge.

a) Cancellation of a contract by itself

A contract is cancelled by the occurrence of any sufficient pretext for dissolution. This means that any circumstance which would render it impossible to carry out the contract without causing hardship to one or both parties in the contract is sufficient to constitute the cancellation of the contract by itself. It can be illustrated by the case of a man who suffers from a toothache and so hires a dentist to pull out the tooth, and then the pain ceases; or a man who suffers a pain in his hand and so hires a surgeon to cut off his hand but the pain afterwards ceases; or a man who hires a cook

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[37] *Majallat al-Aḥkām*, Art. 478.

[38] Ibn Rushd, *Bidāyat al-Mujtahid*, vol. 2, p. 229.

to prepare a marriage festival, but one of the parties going to be married dies. In these cases the contract of hire is dissolved by itself, because if it were to continue, the hirer would suffer a hardship which is not incurred by the contract.[39]

b) Through a decree of court

In certain circumstances, a contract of leasing is not revocable unless a decree of the court is granted. This applies, for example, in a case where a person lets or hires a house or a shop and afterwards becomes poor or involved in debt to the extent that he is unable to discharge it unless he sells the house or shop. In this case the court must dissolve the contract because the lessor has sustained a hardship which is not incurred by the contract. From the expression 'the court must dissolve the contract,' it may be inferred that a decree of the court is required for the dissolution of the contract.[40]

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[39] al-Sanhūrī, *Maṣādir al-Ḥaqq*, vol. 6, p. 95; Hamilton, *op.cit.*, pp. 510-511.

[40] Hamilton, *op.cit.*, p. 511.

Some jurists are of the opinion that the contract of leasing must be dissolved through the consent of both parties in the contract while others say that if *ᶜudhr* is obvious then the decree of the court should not be obtained.[41]

6.6 Fluctuation of currency

The fluctuation of currency rates is a new phenomenon in Islamic commercial law. It is a modern global problem in commercial transactions and contemporary Muslim jurists refer very little to this matter. There are no clear writings or opinions among the classical jurists as this was not a prevalent problem during their time. Further, it is safe to claim that currency exchange did not occur during their time due to the fact that selling of gold for gold or silver for silver is prohibited unless the value is equal. The prohibition of such transactions is derived from a *ḥadīth* of the Prophet which reads:

> "Don't sell gold for gold unless equal in weight, nor silver for silver unless equal in weight, but you may sell gold for silver or silver for gold as you like."[42]

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[41] al-Sanhūrī, *Maṣādir al-Ḥaqq*, vol. 6, p. 95.

[42] *Ṣaḥīḥ al-Bukhārī*, vol. 3, p. 30.

Even though there is a prohibition on selling gold for gold or silver for silver, unless equal in weight, the selling of a dinar for a dinar is permissible. It was narrated by Abū Ṣāliḥ al-Zaiyāt:

> I heard Abū Saᶜīd al-Khudrī said: "The selling of a dinar for a dinar, and a dirham for a dirham, is permissible." I said to him, "Ibn ᶜAbbās does not say the same." Abū Saᶜīd replied, I asked Ibn ᶜAbbās whether he had heard it from the Prophet or seen it in the Holy Book. Ibn ᶜAbbās replied, "I do not claim that, and you know Allah's Messenger better than I, but Usāma informed me that the Prophet had said, "There is no *ribā'* (in money exchange) except when it is not done from hand to hand (i.e. when there is delay in payment)."[43]

Apart from the fluctuation of currency rates, the rocketing price of goods is another modern problem in business transactions where clear solutions based on the *sharīᶜa* have not been achieved. The contemporary jurist al-Sanhūrī has written on this particular issue in his book *al-Wasīṭ*, with reference to the prerequisite of the implementation of the theory of *ḥawādith ṭāri'a* in the new Egyptian Civil Code.[44]

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[43] *Ṣaḥīḥ al-Bukhārī*, vol. 3, p. 31.

[44] al-Sanhūrī, *al-Wasiṭ*, vol. 6, pp. 25-26.

The only source dealing with these matters is the opinion of the classical jurists regarding the fluctuation in the value of gold and silver as currency in business transactions. The general opinion among these schools is that a fluctuation in the value of gold or silver does not allow an adjustment to be made to the price.[45]

The impact of hardship on people in cases of fluctuation of currency rates is a matter of disagreement among the Ḥanafī jurists. In the view of Abū Ḥanīfa, if the value of the currency (other than gold or silver) stipulated in the contract has changed, no adjustment is allowed to be made. Some Ḥanafī jurists allow the value of the currency in relation to gold to be adjusted according to the value at the date of the conclusion of the contract. However if the currency falls into disuse due to market forces, the contract should be rescinded.[46] On the other hand, Abū Yūsuf and Muḥammad maintain that the parties have to fulfil their contract either by paying the agreed price or the last declared market price of the money before it fell into disuse. In another situation, if the devaluation or variations in exchange-rate of currencies is due to government intervention, then the contracting party, in

[45] Ṣāliḥ, "Some Aspects of Frustrated Performance of Contracts Under Middle Eastern Law," *International and Comparative Law Quarterly*, vol. 33, Oct. 1984, p. 1048.

[46] el-Mālik, "The Islamic Concept of Changed Circumstances and its Application to Mineral Agreements," *Yearbook of Islamic and Middle Eastern Law*, 2 (1995), p. 21.

a loan agreement, is bound only by the value stipulated in the contract at the moment of its conclusion.[47]

In the Mālikī school, the fluctuation in the value of a currency or even its fall into disuse does not affect the validity of a contract. The parties involved do not have any right to ask for a price adjustment.[48] The Ḥanbalī school draws a distinction between currency devalued by the act of the government and currency which drops in its value due to economic conditions. If the currency is devalued by the ruler, the damaged party can claim the value of the currency in gold calculated at the date of the conclusion of the contract, whereas if the drop in value is the result of economic conditions, no adjustment can be made.[49]

6.7 *ᶜUdhr* in the contract of leasing: the other schools

The majority of jurists, including Abū Ḥanīfa, Mālik, al-Shāfiᶜī, Aḥmad, Sufyān al-Thāwrī, Abū Thawr and others, are of the opinion that

[47] Ibid., p.21.

[48] Ṣāliḥ, *op.cit.*, p. 1048.

[49] Ibid., p. 1048.

the contract of leasing is a binding (*lāzim*) contract.[50] However, although they share the opinion that the contract of leasing is a binding (*lāzim*) contract, they differ about the mode of revocation.

The idea concerning the event that constitutes *ᶜudhr* in the Ḥanafī school is primarily related to the issue of the parties in the contract who undergo a hardship due to an unexpected event which is beyond their control after the contract has been stipulated, and which consequently leads to the cancellation of the contract. The premise of the disagreement among them consists merely of their perception of certain aspects in the contract of leasing[51] and the appropriate mode of revocation.

According to the Mālikīs, Shāfiᶜīs and others, the contract of leasing is rescinded by the acts with which all other binding contracts are rescinded such as the existence of a defect or the destruction of the source of the derivation of usufruct (*dhahāb maḥall istīfā' al-manfaᶜa*).[52] Their standpoint

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[50] Ibn Rushd, *Bidāyat al-Mujtahid*, vol. 2, p. 229; al-Zuḥaylī, *Naẓariyyāt al-Ḍarūra al-Sharᶜiya*, pp. 322-323.

[51] For example, in the Ḥanafī school, an act constituting *ᶜudhr* can be as simple as changing profession or the intention to make a journey to another place or the object of the contract being stolen. In other schools, such as the Shāfiᶜīs and the Mālikis, for *ᶜudhr* to be constituted, several requirements have to be fulfilled. In other words, *ᶜudhr* in other schools is not as simple as it is for the Ḥanafīs.

[52] Ibn Rushd, *Bidāyat al-Mujtahid*, vol. 2, p. 229.

is based on the verse: "O you who believe! Fulfil your obligations."[53] They rule that leasing is a contract for benefits, which resembles marriage, and due to its status as a contract of exchange, its essence comprising a sale, is not revoked.

According to the Ḥanafīs, leasing is one type of sale.[54] Therefore, the contract of leasing may be revoked due to a disaster suffered by the lessee such as when he hires a shop for trading but his goods get burned or stolen. The basis for the Ḥanafīs' judgement is their analogy between the destruction of the means of usufruct and the destruction of the thing (*ᶜayn*) comprising the usufruct.[55]

The Mālikis are of the opinion that the contract of leasing is revoked by the impossibility of shifting the source of derivation of usufruct legally (*manᶜ istīfā' al-manfaᶜa sharᶜan*), such as when the pain ceases in the case of a person who suffers from a toothache and has hired a dentist, or when a wet-nurse becomes pregnant, or when the utility of a mill is prevented by

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[53] Q., *al-Māida* (5): 1

[54] Ḥanafī jurists hold that leasing is one type of sale. It is a binding contract like any other contract for the sale of goods. The object of contract of leasing is benefit. The contract of leasing is rescinded if there is a defect to the object of the contract, similar to the contract of sale which requires that the object is delivered to the buyer without defect.

[55] Ibn Rushd, *Bidāyat al-Mujtahid*, vol. 2, pp. 229-230.

water being cut off (*inqiṭāᶜ mā' al-raḥā*), or when a slave runs away, or when a slave reaches the age of puberty during the time of the contract, or when a slave or hired animal becomes ill, and the like.[56] According to Mālik, if a hired animal becomes wild and unable to see at night, this may constitute *ᶜudhr* if riding the animal may bring harm and danger to the hirer.[57]

It is interesting to observe the opinions among the Mālikis on this particular matter as stated in *Bidāyat*:

> "Mālik's opinion differs with regard to when hiring is not of a particular (property), but the benefits are to be derived from a particular species generally. ᶜAbd al-Wahhāb said that the preferred opinion of our jurists is that the source of the benefits may not be determined in leasing. If it is, then it becomes a particular attribute and (its contract of hire) is not revoked by its sale or loss, as against the destruction of the hired property. He says that the example is that of shepherding a particular herd of cattle or tailoring a particular shirt; if the cattle and the shirt are destroyed, the contract is not revoked and it is up to the hirer to get similar cattle for shepherding or a shirt for stitching."[58]

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[56] Mālik, *al-Mudawwana al-Kubrā*, vol. 11, pp. 56-117; see also al-Sanhūrī, *Maṣādir al-Ḥaqq*, vol. 6, p. 97; al-Zuḥaylī, *Naẓariyyāt al-Ḍarūra al-Sharᶜiya*, p. 323.

[57] Mālik, *al-Mudawwana al-Kubrā*, vol. 4, p. 475.

[58] Ibn Rushd, *Bidāyat al-Mujtahid*, vol. 2, p. 230.

Some of the later jurists assert that this does not constitute a dispute in the school, but rather that there are two different cases. The first is where the source of the benefit in itself may be the object, and secondly, where it may not be the object in itself. If a particular thing is intended in itself, the contract is revoked if the object is destroyed, as in the case of wet-nursing if the baby dies. If a particular thing is not intended in itself, the contract of leasing is not revoked by its destruction, as in the case of shepherding.[59]

Mālik's standpoint regarding the issue of hiring a wet-nurse could be considered as quite conclusive. According to Mālik, the contract of hiring is terminated if the wet-nurse becomes pregnant or if the baby dies. In the case of the baby dying, the wet-nurse will be paid on the basis of her period of service. If she becomes sick and is unable to feed the baby, the contract is terminated as well. However, if she recovers from her sickness and the period of the contract is still valid, she will be given the option of proceeding for the remaining period and being paid accordingly.[60]

In the Shāfiᶜi school, the basic principle is that the contract of leasing is not revocable by *ᶜudhr*.[61] The standpoint of the Shāfiᶜīs on this matter is that

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[59] Ibn Rushd, *Bidāyat al-Mujtahid*, vol. 2, p. 230.

[60] Mālik, *al-Mudawwana al-Kubrā*, vol. 4, pp. 442-443.

[61] al-Sharbinī, *Mughnī al-Muḥtāj*, vol. 3, p. 483; al-Jazīrī, *op.cit.*, vol. 3, p. 164.

leasing is a type of sale. Similar to a sale contract, a leasing contract is concluded by the consent of both parties in the contract and cannot be dissolved unless by the consent of those parties.[62] In addition to that, the contract of leasing may only be revoked for the following reasons: firstly, if there is a fault in the object of contract (*al-maᶜqūd ᶜalayh*); secondly, if the defect in the object of the contract reduces the value of the usufruct; and thirdly, if the impossibility of deriving the usufruct is legal. A fault in the object of contract which constitutes a defect would be like an animal not keeping a straight back when walking, or an animal limping which makes it straggle behind the caravan, or a hired animal that is wild or biting or a man hired for work who has poor eye-sight or suffers from a disease like leprosy or madness. The impossibility of deriving usufruct could occur when the wall of a rented house collapses, or water is cut off or changed so that it is made unfit for drinking, ablution, and the like.[63]

The Shāfiᶜīs do not recognise hardship arising from something outside the object of leasing, such as in the case of someone who hires a bath-house but his business is a failure. In this case he is not entitled to claim for revocation because the object of leasing (the bath-house) remains intact.

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[62] al-Kāsānī, *op.cit.*, vol. 4, p. 197.

[63] al-Shīrāzī, *al-Muhadhdhab*, vol. I, p. 405; al-Sanhūrī, *Maṣādir al-Ḥaqq*, vol. 6, p. 99; al-Zuḥaylī, *Naẓariyyāt al-Ḍarūra al-Sharᶜiya*, p. 323.

The same rule applies to someone who hires land for agricultural work but the crops are destroyed by excessive rain, cold, locusts, snow and the like. The reason for this is that the calamity occurs to the property of the lessor, not the usufruct of the land (*manfaᶜat al-arḍ*).[64]

A statement by al-Shirbinī represents the Shāfiᶜīs' standpoint in this particular matter:

> "A contract of leasing is not terminated whether *ᶜudhr* comes from the object of the contract or the performance itself because of the death of any party in the contract. The contract remains valid due to its status as a binding contract. It is not terminated by the death of any party in the contract, similar to a contract of sale. In such a case, the heir of the lessor will inherit the benefit of the leasing."[65]

It is important to note that the contract of leasing is not terminated if the parties in the contract die in their capacity as contracting parties. However, the contract is terminated if the lessor dies in his capacity as a subject of the contract.[66] For example, this would occur if someone hires a doctor for an operation to cure his illness but dies before the operation takes

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[64] al-Sharbinī, *Mughnī al-Muḥtāj*, vol. 3, p. 484; al-Shirbinī, *al-Iqnāᶜ fī ḥill `l-alfāẓ Abī Shujāᶜ*, vol. 2, p. 18; al-Jazīrī, *op.cit.*, vol. 3, p. 164; al-Sanhūrī, *Maṣādir al-Ḥaqq*, vol. 6, pp. 99-100.

[65] al-Shirbinī, *al-Iqnāᶜ fī ḥil `l-alfāẓ Abī Shujāᶜ*, vol. 2, p. 17.

[66] al-Shirbinī, *ibid.*, vol. 2, p. 17.

place. In such circumstances, the hirer dies in his capacity as a subject of the contract, not in his capacity as one of the contracting parties. Accordingly, the contract is terminated.

The Ḥanbalīs require that the impossibility of deriving the usufruct of the leasing object comes from the object itself such as when a hired animal runs away, or a wall collapses, or a wet-nurse or an infant dies. If a crop is destroyed by flood, fire, locusts, cold or the like, the contract is not revoked because the crop itself is not the object of the contract. The Ḥanbalīs also require that there is a defect to the object of the contract which reduces the value of the usufruct. Apart from under these two conditions, the contract cannot be revoked unless the event is of a general nature, inflicted not only to the contracting parties but also on the general population, such as when there is a general fear to all people in the country.[67]

Ibn Qudāma further illustrates an event of general application:

> "[Let us suppose that] There is an event causing general fear that prevents the people of the place who have an object of leasing (*al-ᶜayn al-musta'jara*) from enjoying it or the country is surrounded which prevents the people from working on their land and the like. In such cases the lessee is given the option of revoking the contract

[67] Ibn Qudāma, *op.cit.*, vol. 5, p. 418; al-Sanhūrī, *Maṣādir al-Ḥaqq*, vol. 6, pp. 101-102.

because the nature of the event prevents the lessee from enjoying the usufruct, such as when an object has been robbed...".[68]

Ibn Taimiyya, an eminent Ḥanbalī jurist is more straightforward in his opinion regarding a contract of leasing and hiring which is spoiled by calamity. He says:

> "With regard to calamities (*jawā'iḥ*) in a contract of hiring, there is no dispute among the jurists that the contract is dissolved if the benefit of the contract extinguishes before it been possessed. There is no dispute among the jurists in this issue compared to the issue of selling fruits which have stricken with calamity. In selling fruits, the object of the contract can be possessed immediately after the contract. On the contrary, a benefit from a contract of hiring cannot be possessed immediately after the contract. Therefore, the jurists have arrived at consensus that a contract of hiring is dissolved if the benefit of the contract is destroyed before it has been possessed. The contract is also dissolved if the benefit has been possessed before it has been enjoyed."[69]

In the case of an object of hire which is destroyed during the period of the contract, Ibn Taimiyya is of an opinion that the remaining period of the contract is dissolved. According to him, the benefit of the contract is extinguished in two forms:

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[68] Ibn Qudāma, *op.cit.*, vol. 5, p. 418.

[69] Ibn Taimiyya, *op.cit.*, vol. 30, p. 288.

a) the object of the contract is destroyed, such as when an animal available for hire dies.

b) the benefit of the contract cannot be enjoyed, such as when a house is demolished, or land for agriculture has been flooded, or irrigation has stopped. If part of the benefit can still be enjoyed, such as when a crop can be grown without water in the absence of irrigation, then the contract remains valid, even though the profit becomes less. Such a situation is analogous to a defect in a contract of sale. Accordingly, a contract of hire is not terminated.[70] In this regard, Ibn Taimiyya provides a practical solution to the problem as follows:

> "The loss of profit which has been stipulated in the contract should be treated like a solution on a defect in the object of sales. First, value the land without the calamity and then assess its value when stricken with the calamity. The difference is considered to be the loss. Therefore, a payment is deducted equivalent to the loss suffered by the parties in the contract. For example, if the amount of a profit from the land when free from calamity is 1000 dināars, and the amount when stricken with calamity is 800 dināars, then the calamity has reduced the profit by one-fifth. Therefore, one-fifth will be deducted from the payment."[71]

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[70] Ibn Taimiyya, *op.cit.*, vol. 30, p. 289.

[71] Ibn Taimiyya, *op.cit.*, vol. 30, pp. 300-301.

It is important to note that Ibn Taimiyya's point of view of what adheres in the event of unforeseen circumstances in a contract of hiring and leasing is different from other jurists. While the Ḥanafīs and other jurists are of the opinion that the termination of the contract of hiring and leasing in the event of unforeseen circumstances is made on the ground of *ᶜudhr*, Ibn Taimiyya makes no distinction between unforeseen circumstances in a contract of selling fruit and in a contract of hiring and leasing. In both cases, he classifies the termination of the contract as occurring on the ground of *jā'iḥa*.

6.8 *ᶜUdhr* as a ground for *ḥawādith ṭāri'a*

As discussed earlier, a general premise in the Ḥanafī school regarding *ᶜudhr* in a contract of hiring or leasing is the avoidance of any hardship to the parties in the contract. From the outset, *ᶜudhr* is not seen as an exception to the principle of the sanctity of contract due to unexpected circumstances. However, the fundamental principle underlying the application of the doctrine of *ᶜudhr* is the element of unforeseeable circumstances at the time of the conclusion of the contract. This element is similar to a fundamental element in the counterpart of the theory of *ḥawādith ṭāri'a* in Western legislation. The similarity in these fundamental elements is seen as the basis

on which to expound the theory of *ḥawādith ṭāri'a* in Islam by contemporary Muslim jurists.

It is interesting to note that *ᶜudhr* in the Ḥanafī school is not something which necessarily makes performance of the contract impossible. On the other hand, the same element is required by the theory of *ḥawādith ṭāri'a* where the onerous nature of the performance is sufficient to constitute the theory.

Even though there are similarities between the doctrine of *ᶜudhr* and the theory of *ḥawādith ṭāri'a*, the doctrine of *ᶜudhr* requires the contract to be dissolved if the conditions that are required by the doctrine are fulfilled. In the theory of *ḥawādith ṭāri'a*, however, a solution to the problem is reached by reducing or adjusting the onerous obligation to a reasonable limit only.

Conclusion

Through this chapter, the doctrine of *ᶜudhr* in the Ḥanafī school has been discussed, especially with regard to contracts of hire and leasing. The application of the doctrine in the Ḥanafī school seems to be very broad and unconditional. A release from contractual obligation as a result of the

termination of a contract can be obtained by virtue of a change of circumstances in a very simple manner. The standpoint of the Ḥanafīs is understandable because the basic principle of the doctrine is to bring relief to the parties in the contract who would suffer a hardship due to unexpected circumstances that make the obligation of the contract excessively onerous if not absolutely impossible.

Even though the other schools recognise the doctrine of *ᶜudhr*, it is clear that they take a very stringent approach, especially in using the doctrine as grounds for the termination of a contract. From the standpoint of modern jurists, similarities in the elements which constitute the doctrine of *ᶜudhr* and the elements that are invoke for the theory of *ḥawādith ṭāri'a* are seen as a basis on which to establish the theory itself, rather than for the comparison of two different entities. In spite of differences of approach and perception of looking into the doctrine of *ᶜudhr* between the early jurists and their modern counterparts, we may still draw the conclusion that the idea behind the doctrine of *ᶜudhr* is to lighten the burden on the parties to a contract resulting from unforeseen circumstances.

CONCLUSION

The Qur'anic verse "fulfil your obligations" and the *ḥadīth* of the Prophet that "Muslims must honour their agreements," suggest that Islam recognises the sanctity of a contract. However, in exceptional circumstances, the contractual obligation becomes excessively onerous to be performed. Drawing information from the classical legal texts, contemporary Muslim jurists have formulated a new theory in *fiqh* known as '*ḥawādith ṭāri'a*' which deals with the sanctity of a contract and the solution to the non-performance of a contractual obligation.

The theory of *ḥawādith ṭāri'a* has come to light in modern *fiqh* since its inclusion in the new Egyptian Civil Code of 1949. *Ḥawādith ṭāri'a* as it is provided in the Egyptian Civil Codes is a clause for an exception to the performance of a contractual obligation that has become excessively onerous due to unforeseen circumstances. Although it is quite obvious that the provision is heavily influenced by the theory of changed circumstances in Western legal thought, the claim that the theory has its origin in the *sharī*^{c}*a*, has adequate grounds for justification. An idea akin to the theory of

ḥawādith ṭāri'a can be derived from the works of early Muslim jurists in classical legal texts under the general notion of "*āfa samawiyya*" and "'*amr min Allāh*."

The fact that the Qur'ān does not explicitly prescribe a text for the legality of the theory has attracted modern Muslim jurists to search elsewhere for the authority of the theory. In doing so, they have turned to the principles of Islamic jurisprudence and found therein the concepts of justice and equity. The theory is also built around the rules of necessity and need which are systematically derived from certain Islamic legal maxims. Without doubt, even though the theory has a strong foundation in the principles of Islamic jurisprudence, the most significant authority for the theory lies in the *ḥadīths* of the Prophet. These *ḥadīths* are, in principle, the authority for several doctrines in *fiqh* which have been constructed to form legal texts in the *sharī*^{c}*a*.

Even though *ḥawādith ṭāri'a* is part of the law of contract, its existence in commercial transactions is due to the fact that the Book of Sales is considered as the most important of the nominate contracts which lay the foundations for the law of contract in Islam. From this basis, the theory of *ḥawādith ṭāri'a* has been developed under the doctrines of *waḍ*^{c} *al-jawā'iḥ*, *bay*^{c} *al-thimār qabla an yabduwa ṣalāḥuhā* and ^{c}*udhr*. As far as

the doctrine of *waḍ^{c} al-jawā'iḥ* is concerned, the early jurists have provided sufficient discussion in the classical legal texts with regard to the general concept of the theory. The *ḥadīths* which support the doctrine on this particular subject not only underline the fundamental elements of the theory but also in certain instances, show an actual application of the theory during the lifetime of the Prophet and therefore, can be considered as a precedent to the theory. In the works of the jurists, apart from formulating the general concepts of the theory, a hypothetical case approach is also used by them, particularly by the Ḥanafīs when dealing with the doctrine of *^{c}udhr*.

In its codified form, the theory of *ḥawādith ṭāri'a* has been made part of most civil codes in the Arab countries. While *sharī^{c}a* stands as its pillar, the influence of the Western civil codes - at least in shape - is still felt. Since its inception in the Egyptian Civil Code, several amendments have been made to the provisions of other countries, mostly towards an adaptation to the *madhhab* which is subscribed to by those countries. Although the purpose of these amendments is to harmonise the provisions with the prevailing view of the *madhhabs* concerned, indirectly, this step has made the provisions more closer to the traditional spirit of the *sharī^{c}a*.

Ḥawādith ṭāri'a in its present form, and as it is portrayed in modern legislation, is considered as an exception to the general notion of the sanctity

of contract. Several doctrines on which the theory is founded, in their truest sense, are basic principles in *fiqh* to accommodate legal matters in commercial transactions. It is correct to say that *waḍ^{c} al-jawā'iḥ*, *bay^{c} al-thimār qabla an yabduwa ṣalāḥuhā* and *^{c}udhr*, in their classical form, are not intended to be an exception to the sanctity of contract. The doctrines stand by themselves as principles in *fiqh* and can still be considered as they are. Nevertheless, seeing them from a modern perspective, it is appropriate to conclude that *waḍ^{c} al-jawā'iḥ*, *bay^{c} al-thimār qabla an yabduwa ṣalāḥuhā* and *^{c}udhr* provide a general background to the theory of *ḥawādith ṭāri'a*. In an era of enthusiasm to re-establish the *sharī^{c}a* in modern legislation, the reconstruction of the classical concepts of *fiqh* seems irresistible in order to meet the needs of a modern legal system. In this respect, the theory of *ḥawādith ṭāri'a* has achieved this target.

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